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VOLUME 6

Part 2

1974 Cumulative Pocket Supplement

Containing

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF
REPLACEMENT VOLUME 6 (PART 2) OF
THE 1947 REVISED CODES

AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 6
(PART 2) THROUGH VOLUME 518, PACIFIC
REPORTER (2ND SERIES)

Edited by

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THE ALLEN SMITH COMPANY

Publishers

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- Section 91-105. State institutions which may take by gift, bequest or grant.
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91-103. (6976) Will, or part thereof, procured by fraud.

Undue Influence

Substantial evidence of undue influence was shown where beneficiary under a second will was never close to the testator until learning of his bank account, and importuned upon him, while in a weakened condition, so that the testator rejected his friends. *In re Maricich's Estate*, 145 M 146, 400 P 2d 873.

The contestant has the burden of showing undue influence. *In re Maricich's Estate*, 145 M 146, 400 P 2d 873.

In considering undue influence, the court may take into account confidential relationship of person attempting to influence testator, his physical and mental condition as it affects his ability to withstand influence, the unnaturalness of the disposition, and the demands made upon

the testator in light of the circumstances. *In re Maricich's Estate*, 145 M 146, 400 P 2d 873.

Evidence that testator devised bulk of his estate to charitable institution and that public administratrix who had drafted will was named as executor of estate and that her fee was set at a higher figure by statute than that which a relative or other ordinary person would receive as executor was insufficient to set aside directed verdict allowing probate of will because evidence did not disclose that undue influence was actually exercised and that such influence resulted in testamentary provisions which were not those of the testator's will but those of the parties exercising such influence. *Wallin v. Kinyon Estate*, — M —, 519 P 2d 1236.

91-105. (6978) State institutions which may take by gift, bequest or grant. The state of Montana, units of the university of Montana, the state school for the deaf and blind, all institutions in the department of institutions, and any and all institutions now created or established, or which may hereafter be created or established, and supported in whole or in part by the state of Montana for any purpose, are hereby empowered and given the right to accept, receive, take, hold, own, and possess gifts, donations, grants, devises, or bequests of real or personal property from any source whatsoever; and said gifts, donations, grants, bequests, or devises may be made direct to the state of Montana, or in the name of any of said institutions, or to any officer or board of said institutions, or to any person in trust for said institutions; but in the event the same shall be made direct to any such institution, or to any officer or board of any such institution, such gift, donation, grant, devise, or bequest shall be construed as a gift, donation, grant, devise, or bequest to the state of Montana, and shall be administered and used by the state of Montana for the particular purpose for which the same was given, donated, granted, bequeathed, or devised; and in the event no particular purpose is mentioned in such gift, grant, devise, or bequest, then the same shall be used for the general support, maintenance or improvement of such institution by the state of Montana.

History: En. Sec. 1, Ch. 17, L. 1913; re-en. Sec. 6978, R. C. M. 1921; amd. Sec. 96, Ch. 199, L. 1965.

Amendment

The 1965 amendment inserted "units of" before "the university of Montana"; deleted "the state normal college, the state orphans' home" after "university of Mon-

tana"; and substituted "all institutions in the department of institutions" for "the state school of mines, the state reform school, the soldiers' home, the Montana state tuberculosis sanitarium, the state asylum for the insane, the state penitentiary" after "school for the deaf and blind."

91-106. (6979) Persons who may make gifts to state institution. A donation, gift, grant, bequest, devise, or testamentary disposition of property, real or personal, may be made by any person over the age of eighteen years, of sound mind, to the state of Montana, a unit of the university of Montana, the state school for deaf and blind, an institution in the department of institutions, and any and all institutions now created or established, or which may hereafter be created or established and supported, in whole or in part, by the state of Montana for any purpose. And any person, corporation, or association of persons may make any gift, donation, or grant of property, real or personal, to the state of Montana, or to any of the institutions above-named or referred to; but in the event any gift, donation, grant, devise, or bequest shall be made to any such institution, or to any officer or board of any such institution, the same shall be construed as a gift, donation, grant, devise, or bequest to the state of Montana, and shall be administered and used for the state of Montana for the particular purpose for which the same was given, donated, granted, bequeathed, or devised; and in the event no particular purpose is mentioned in such gift, grant, devise, or bequest, then the same shall be used for the general support, maintenance, or improvement of such institution by the state of Montana.

History: En. Sec. 2, Ch. 17, L. 1913; re-en. Sec. 6979, R. C. M. 1921; amd. Sec. 97, Ch. 199, L. 1965.

Amendment

The 1965 amendment inserted "a unit of" before the university of Montana; deleted "the state normal college, the state

orphans' home" after "university of Montana"; and substituted "an institution in the department of institutions" for "the state school of mines, the state reform school, the soldiers' home, the state asylum for the insane, the state penitentiary" after "school for deaf and blind."

91-107. (6980) Written will, how to be executed.

Declaration to Attesting Witnesses

Evidence that testator did not verbally declare to attesting witnesses that the document was his last will and testament but that he merely handed the pen to the witness and by motion indicated that he wished the witness to sign the attestation clause did not establish a deficiency in execution since the declarations by the testator need not be in exact terms but may be implied from his conduct and the attendant circumstances. *Wallin v. Kinyon Estate*, — M —, 519 P 2d 1236.

Substantial Compliance

In order for will to be validly executed there must be substantial compliance with this section, not compliance with a substantial portion of this section; there was no substantial compliance where testator procured signatures of attesting witnesses on separate occasions and attempted to conceal nature of the document from them and one witness testified he did not know if testator's signature was on document at time he attested to it. In *re Estate of Birkeland*, — M —, 519 P 2d 154.

91-136. (7009) Children or issue of children of testator, etc.

References

In *re Jones' Estate*, 146 M 439, 408 P 2d 482.

91-142. (7015) Restriction to devise for charitable purposes.

Objections to Probate of Will

Trial court properly granted motion in limine to preclude opponent to probating of will from eliciting testimony respecting the claimed invalidity of the bequest to a cemetery district since such issues as

charitable bequests and their validity in conforming with this section may only be determined in appropriate proceedings after the will is formally admitted to probate. *Wallin v. Kinyon Estate*, — M —, 519 P 2d 1236.

CHAPTER 2—WILLS—INTERPRETATION

91-202. (7017) Intention to be ascertained from will.

Division of Residue

Holographic will making specific bequests to various persons' children and directing that any residue be divided by percentage "to all of them more or less" was construed to bequeath specific sums

to children as classes rather than individually but with children to participate equally as individuals in residue. In *re Estate of Jensen*, 152 M 495, 452 P 2d 418.

91-205. (7020) Harmonizing various parts.

Intention of Testator

Holographic will making specific bequests to various persons' children and directing that any residue be divided by percentage "to all of them more or less" was construed to bequeath specific sums to children as classes rather than individually but with children to participate equally as individuals in residue. In *re Estate of Jensen*, 152 M 495, 452 P 2d 418.

Where sole purpose and object of trust was payment of income for life to testator's wife, mother, sister and son, and such obligations were either fulfilled or no longer possible of fulfillment, trial court properly terminated trust. *Testamentary Trust of Child*, 153 M 349, 457 P 2d 447.

91-209. (7024) Words to receive an operative construction.**Ambiguous Phrase**

Holographic will making specific bequests to various persons' children and directing that any residue be divided by percentage "to all of them more or less" was construed to bequeath specific sums to children as classes rather than individ-

ually but with children to participate equally as individuals in residue. In re Estate of Jensen, 152 M 495, 452 P 2d 418.

References

In re Jones' Estate, 146 M 439, 408 P 2d 482.

91-210. (7025) Intestacy to be avoided.**Establishment of Will**

The presumption in this section does not aid in making a will out of an instrument that showed no testamentary intent other than use of the word "will" but rather spoke in terms of authorizing present acts with respect to personal prop-

erty. In re Estate of Gasparovich, 158 M 21, 487 P 2d 1148.

References

In re Jones' Estate, 146 M 439, 408 P 2d 482.

CHAPTER 3—WILLS—GENERAL PROVISIONS**91-303. (7053) Order of resort to estate for debts.****Federal Estate Taxes**

In absence of clause in will prohibiting surviving spouse's share from being limited, reduced or lessened by estate taxes, the surviving spouse's share of the resid-

uary estate was not exempt from its proportional share of the federal estate tax. Robinson v. United States, 369 F Supp 925.

CHAPTER 4—SUCCESSION

Section 91-403. Succession to and distribution of estates.

91-403. (7073) Succession to and distribution of estates. When any person having title to any estate not limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided by the laws of Montana, subject to the payment of his debts, in the following manner:

1. If the decedent leaves a surviving husband or wife, only one (1) child, or the lawful issue of one (1) child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one (1) child living, or one (1) child living, and the lawful issue of one (1) or more deceased children, one-third ($\frac{1}{3}$) to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one (1) child living, or one (1) child living, and the lawful issue of one (1) or more deceased children, then the estate goes in equal

shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

2. * * * [Same as parent volume.]

3. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister, by right of representation.

4. to 7. * * * [Same as parent volume.]

History: Ap. p. Sec. 252, p. 361, Cod. Stat. 1871; amd. Sec. 534, p. 364, L. 1877; re-en. Sec. 534, 2nd Div. Rev. Stat. 1879; re-en. Sec. 534, 2nd Div. Comp. Stat. 1887; amd. Sec. 1852, Civ. C. 1895; re-en. Sec. 4820, Rev. C. 1907, Subd. 8; En. Sec. 535, p. 366, L. 1877; amd. Sec. 1, p. 48, L. 1879; re-en. Sec. 535, 2nd Div. Rev. Stat. 1879; re-en. Sec. 535, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1852, Civ. C. 1895; re-en. Sec. 4820, Rev. C. 1907; re-en. Sec. 7073, R. C. M. 1921; amd. Sec. 1, Ch. 140, L. 1941; amd. Sec. 1, Ch. 60, L. 1947; amd. Sec. 1, Ch. 217, L. 1971. Cal. Civ. C. Sec. 1386.

Compiler's Notes

The case of *Brundy v. Canby*, 50 M 454, 148 P 315, annotated under this section in the parent volume, was decided in 1915, before the 1941 amendment of this section. The reasons for the decision would no longer apply under the present version of the statute. See the first sentence, subdivision 2 of this section.

Amendments

The 1971 amendment inserted "or grandchildren" in subdivision 3 and made a minor change in phraseology.

Nieces and Nephews

Where decedent was survived only by nieces and nephews and children of deceased nephews, the nieces and nephews took per capita and the children of deceased nephews took per stirpes the share that their fathers would have taken. In re Estate of Brown, 158 M 413, 492 P 2d 914.

Surviving Parent

Where decedent left no surviving wife nor children and his father was dead, his mother would be the sole beneficiary of his estate under this section. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

91-417. (7087) Inheritance by representation.

Degree of Kinship

The right of representation applies to any degree of kinship, and where the nearest heirs were nieces and nephews,

the children of deceased nephews were heirs by right of representation. In re Estate of Brown, 158 M 413, 492 P 2d 914.

91-423. Uniform Simultaneous Death Act, etc.

Compiler's Notes

In addition to the jurisdictions noted in the parent volume, Georgia and the Virgin

Islands have adopted the Uniform Simultaneous Death Act.

CHAPTER 5—ESCHEATED ESTATES—INHERITANCE BY NONRESIDENT ALIENS—DISPOSAL OF UNCLAIMED PROPERTY

- Section 91-502. Title to escheated property vests in state—when.
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 91-512. Duty of attorney general—employment of special assistant.
 91-520. Conditions under which aliens in foreign country may inherit.
 91-523. Disposition of money.

91-502. Title to escheated property vests in state—when. Whenever the title to any property, either real or personal, or mixed, fails for any reason including want of heirs or next of kin, such title shall vest in the state of Montana immediately upon the death of the owner without an inquest or other proceeding in the nature of office found, and there shall be no presumption that such owner died leaving heirs or next of kin; provided that in relation to property other than estates, title shall be presumed to have failed whenever the owner, beneficial owner, or person entitled to any such property within this state has been or shall be and remain unknown for a period of twenty (20) successive years, and during such period whenever the whereabouts of such owner, beneficial owner or persons has been or shall be and remain unknown, and during such period whenever any personal property wherever situated has been or shall be and remain unclaimed, then, in such event, such personal property shall escheat to the state.

All sums escheated under the provisions of the Escheated Property Act shall be delivered by the state department of revenue to the state treasurer and deposited by the treasurer in the agency fund; in connection with the recovery of money or property from escheats other than those from estates, the state department of revenue is hereby authorized and directed to deduct the costs incurred in reducing such moneys or property to the possession of the state of Montana, which sum shall not exceed five per centum (5%) of the amount so recovered, except for such other costs and fees as the judgment of escheat shall so direct.

Moneys and properties placed in the agency fund shall be held in trust for a period of ten (10) years prior to deposit in the public school subfund in the trust and legacy fund by the state treasurer; such ten (10) year period being a time within which the owner, beneficial owner, or any person having a right, title, or interest in the property or money escheated may make claim by the institution of an action for the dissolution of the trust in an amount equal to the full amount or value of the property escheated minus the costs and expenses incident to reducing the same to the possession of the state.

In order to ascertain if any person has knowledge of or is in possession of any escheatable property, it shall be lawful for the attorney general or his assistant to obtain discovery on motion in the district court requiring any such person or persons to divulge any information they may have concerning the possession or location of any property subject to escheat, or any other information pertinent to the recovery of such property by the state of Montana or which information may lead to the discovery of such escheatable property.

History: En. Sec. 2, Ch. 184, L. 1943; amd. Sec. 1, Ch. 170, L. 1953; amd. Sec. 110, Ch. 147, L. 1963; amd. Sec. 1, Ch. 156, L. 1971; amd. Sec. 67, Ch. 391, L. 1973.

Amendments

The 1971 amendment inserted "delivered by the state board of equalization to the state treasurer and" in the first part

of the second paragraph; and substituted "the state board of equalization" for "the state treasurer" in the latter part of the second paragraph.

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places in the second paragraph.

91-504. Investment and disposition of money and property. The moneys thus deposited may, upon order of the court or judge, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is for the best interests of the estate. At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge shall make an order directing the public administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall keep an account with such estate of all moneys received and paid to him, and the county treasurer shall forthwith remit all of said money to the state department of revenue with a statement as to the estates to which the money belongs. The department shall immediately deliver such money to the state treasurer who shall thereupon deposit such money so received by him in the agency fund of the state of Montana.

History: En. Sec. 4, Ch. 184, L. 1943; amd. Sec. 111, Ch. 147, L. 1963; amd. Sec. 2, Ch. 156, L. 1971; amd. Sec. 68, Ch. 391, L. 1973.

Amendments

The 1971 amendment substituted "the state board of equalization" for "the state treasurer" near the end of the second sen-

tence; and substituted "The board shall immediately deliver such money to the state treasurer who shall" for "And the state treasurer shall" at the beginning of the third sentence.

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" in the second and third sentences.

91-505. Unsold personal property, how disposed of—auction sale. If the personal property in an estate was not sold by the executor or administrator at the final settlement of the estates as by law provided, then it shall be the duty of such executor or administrator to turn over all of such property to the county treasurer, who in turn shall deliver it to the state department of revenue with a statement setting forth the name of the estate to which it belongs, and the state department of revenue must within one (1) year of the receipt of such property cause the same to be sold to the highest bidder at a public auction sale, at the department's office in Helena, Montana. The state department of revenue shall give notice of such sale by publication in a newspaper published in the city of Helena, Montana, once a week for two (2) successive weeks, making in all two (2) publications, the last publication to be at least twenty (20) days prior to the date of such sale. Such notice shall give the time and place of such sale and shall contain a list and description of the stocks, bonds, securities, effects, or other personal property to be sold. All of the expenses of such sale shall be deducted from the proceeds thereof by the state department of revenue and the balance of such proceeds shall be delivered by the department to the state treasurer for deposit in the agency fund of the state of Montana.

History: En. Sec. 5, Ch. 184, L. 1943; amd. Sec. 112, Ch. 147, L. 1963; amd. Sec. 3, Ch. 156, L. 1971; amd. Sec. 69, Ch. 391, L. 1973.

Amendments

The 1971 amendment substituted references to the state board of equalization for references to the state treasurer in five

places; and substituted "shall be delivered by the board to the state treasurer for deposit" for "shall be deposited by the state treasurer" near the end of the section.

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" throughout the section.

91-506. Unsold real property, how disposed of—auction sale. If the real property was not sold by the executor or administrator or public administrator at the final settlement of the estate as by law provided, then it shall be the duty of the executor or administrator or public administrator to make and execute to the state of Montana an executor's or administrator's deed and to deliver the same to the county clerk and recorder of the county wherein such real property is situated, and it shall then become the duty of the county clerk and recorder to file and record said deed, without charge, and after being so recorded the county clerk and recorder shall mail the said deed to the state department of revenue which shall make a record thereof and deliver the deed to the state board of land commissioners. Within one (1) year after the receipt of such recorded deed the state board of land commissioners shall cause such property to be sold to the highest bidder at public auction sale, to be held at the courthouse in the county where such real property or any part thereof is situated. The state board of land commissioners shall give notice of such sale by publication in a newspaper published in the county wherein such real estate or any part thereof is situated once a week for two (2) weeks, making in all two (2) publications, the last publication to be at least twenty (20) days prior to the date of such sale. Such notice shall give the time and place of such sale and contain a description of the real property to be sold. All expenses of such sale shall be deducted by the state board of land commissioners from the proceeds thereof and the balance of such proceeds shall be turned over to the state treasurer who shall deposit the same in the agency fund of the state of Montana. The board of land commissioners shall provide the state department of revenue with a statement indicating the sale price, expenses and net proceeds resulting from each such sale.

History: En. Sec. 6, Ch. 184, L. 1943; amd. Sec. 113, Ch. 147, L. 1963; amd. Sec. 4, Ch. 156, L. 1971; amd. Sec. 70, Ch. 391, L. 1973.

Amendments

The 1971 amendment inserted "to the

state board of equalization which shall make a record thereof and deliver the deed" near the end of the first sentence; and added the final sentence.

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places.

91-507. Unclaimed personal property in hands of agent—disposal. Whenever the personal property in an estate remains in the hands of an agent, unclaimed for two (2) years and it appears to the court or judge that it is for the best interests of the estate and those interested therein, such property shall be sold under the order of the court or judge and the proceeds, after deducting the expense of the sale allowed by the court or judge, must be paid to the state department of revenue for deposit into the state treasury, and upon receipt of such proceeds it shall be the duty of the state treasurer to deposit the same in the agency fund of the state of Montana.

History: En. Sec. 7, Ch. 184, L. 1943; amd. Sec. 114, Ch. 147, L. 1963; amd. Sec. 5, Ch. 156, L. 1971; amd. Sec. 71, ch. 391, L. 1973.

Amendments

The 1971 amendment inserted "to the

state board of equalization for deposit" after "must be paid" in the latter part of the section.

The 1973 amendment substituted "department of revenue" for "board of equalization."

91-508. Sales by state department of revenue, how conducted. All hereinbefore mentioned sales by the state department of revenue must be at public auction at the department's office. Said sales must be for cash and shall be made to the highest bidder, provided, however, that the department may reject all bids which are disproportionate to the value of the property being sold.

History: En. Sec. 8, Ch. 184, L. 1943; amd. Sec. 6, Ch. 156, L. 1971; amd. Sec. 72, Ch. 391, L. 1973.

Amendments

The 1971 amendment substituted references to the state board of equalization

for references to the state treasurer in three places; and deleted "in the state capitol" from the end of the first sentence.

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" throughout the section.

91-509. Court action by claimant of property in hands of state treasurer—limitation of action—judgment. Any persons claiming property in the hands of the state treasurer must bring an action in the district court of Lewis and Clark county, Montana, against the state treasurer. In such action one copy of the complaint and summons must be served upon the state treasurer, one must be served upon the attorney general and one must be served upon the director of revenue.

Such action shall be prosecuted subject to all of the provisions of the statutes of this state in relation to civil actions generally, including the right of either party to appeal to the supreme court of the state of Montana. Such action must be brought within two (2) years from the date on which the money or property is received by the state treasurer, saving, however, to infants and persons of unsound mind, or citizens of the United States beyond the limits of the United States, the right to commence their action at any time within the time limited or two (2) years after their respective disabilities cease.

The judgment of the court in such action shall determine and fix the amount of inheritance tax, if any, which is due from said claimant to the state of Montana upon the money or property claimed and none of said money or property shall be turned over to said claimant until said inheritance tax is paid. The state department of revenue shall issue its interlocutory certificate showing the amount of said inheritance tax due, if any, and shall have the right to file objections and be heard upon the final determination of said tax.

History: En. Sec. 9, Ch. 184, L. 1943; amd. Sec. 1, Ch. 79, L. 1945; amd. Sec. 73, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "di-

rector of revenue" for "state board of equalization" at the end of the first paragraph; and substituted "department of revenue" for "board of equalization" in the second sentence of the third paragraph.

91-512. Duty of attorney general—employment of special assistant. The attorney general of the state of Montana shall be the legal adviser in connection with all escheated property matters and it shall be the duty of the attorney general to make investigations and conduct inquiries to determine whether there is property in the state of Montana which should escheat to the state of Montana, and to take all steps necessary to secure such escheat, and for this purpose the attorney general is authorized and

empowered to employ a special assistant and incur necessary expenses subject to appropriation limitations.

History: En. Sec. 12, Ch. 184, L. 1943; amd. Sec. 1, Ch. 193, L. 1953; amd. Sec. 115, Ch. 147, L. 1963; amd. Sec. 1, Ch. 377, L. 1971.

Amendments

The 1971 amendment substituted "and incur necessary expenses subject to ap-

propriation limitations" at the end of the section for "at a salary not to exceed six thousand dollars (\$6,000.00) per annum together with actual, necessary expenses while engaged in outside work in connection with the duties of his office as defined by law."

91-520. Conditions under which aliens in foreign country may inherit.

1. No person shall receive money or property, save and except mining property as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the state of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

2. to 6. * * * [Same as parent volume.]

History: En. Sec. 2, Ch. 104, L. 1939; amd. Sec. 1, Ch. 31, L. 1951; amd. Sec. 1, Ch. 144, L. 1953; amd. Sec. 55, Ch. 100, L. 1973.

Amendments

The 1973 amendment deleted "as provided in section 25, article III, of the constitution of the state of Montana" after "except mining property" in subsection 1.

Injunction

Residents of Romania could not enjoin enforcement of statute while probate case was at intermediate stage since state is free to fashion procedure for applying

statute in manner not offensive to constitution. *Gorun v. Fall*, 287 F Supp 725, affirmed, 393 US 398, 21 L Ed 2d 628, 89 S Ct 678.

Reciprocity

Pursuant to Rule 44.1, M. R. Civ. P., trial court has power to fashion procedures for determination of whether reciprocity of transfer and reciprocity of inheritance exists between citizens of state and citizens of foreign country. In re Estate of Giurgiu, 155 M 18, 466 P 2d 83, appeal dismissed 399 US 901, 26 L Ed 2d 555, 90 S Ct 2195.

91-523. Disposition of money. All money, including that realized from the sale or sales of property delivered to the county by an executor or administrator, under the provisions of this act shall, immediately upon its receipt by the county treasurer be delivered to the state department of revenue which shall immediately deliver same to the state treasurer and by him deposited in the agency fund of the state of Montana.

History: En. Sec. 4, Ch. 104, L. 1939; amd. Sec. 1, Ch. 18, L. 1947; amd. Sec. 116, Ch. 147, L. 1963; amd. Sec. 7, Ch. 156, L. 1971; amd. Sec. 74, Ch. 391, L. 1973.

Amendments

The 1971 amendment inserted "to the

state board of equalization which shall immediately deliver same" before "to the state treasurer" in the latter part of the section.

The 1973 amendment substituted "department of revenue" for "board of equalization."

CHAPTER 6—PROBATE PROCEEDINGS—PUBLIC ADMINISTRATOR

Section 91-623. Estates less than fifteen hundred dollars (\$1,500).

91-628. Compensation of public administrator.

91-623. (10012) Estates less than fifteen hundred dollars (\$1,500). If the statement or statements furnished the public administrator in accordance with the provisions of section 91-621 show that the aggregate market value of the estate of such deceased person is fifteen hundred dollars (\$1,500) or less in value, then, upon demand of the public administrator, the person, firm, bank, or corporation holding, controlling, or owning the same, or any part thereof, shall turn over, endorse, or surrender the same to such public administrator at once, without the issuance of letters of administration to him. The public administrator shall, upon receipt of the money, evidence of indebtedness, or other personal property, issue a receipt to the person, firm, bank, or corporation delivering the same to him fully describing the property received. Such receipt, signed by the public administrator, shall fully discharge the person, firm, bank, or corporation receiving the same from all further liability to the estate of said deceased person, to the amount of money or for the property set out in said receipt.

History: En. Sec. 3, Ch. 134, L. 1909; re-en. Sec. 10012, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1929; amd. Sec. 1, Ch. 222, L. 1969.

Amendments

The 1969 amendment substituted "fifteen hundred dollars (\$1,500)" for "five hundred dollars (\$500.00)" after "estate of such deceased person is" in the first sentence.

91-628. (10017) Compensation of public administrator. The public administrator shall receive as full compensation for his services, including attorney's fees, a commission of fifteen per cent (15%) of the total amount of money received by him in any estate provided for in this act; provided, that in no case shall the compensation be less than twenty-five dollars (\$25).

History: En. Sec. 8, Ch. 134, L. 1909; re-en. Sec. 10017, R. C. M. 1921; amd. Sec. 1, Ch. 3, L. 1969.

Amendments

The 1969 amendment raised the administrator's minimum compensation from "five dollars" to "twenty-five dollars."

CHAPTER 7—PROBATE PROCEEDINGS—GENERAL JURISDICTION OF DISTRICT COURT

91-701. (10018) Jurisdiction of the court over the estate, etc.

Residence of Decedent

County where intestate decedent was domiciled had sole and exclusive jurisdiction over her estate and where order from another county recited the correct do-

micile but nevertheless issued letters of administration, the order was void on its face and subject to both collateral and direct attack. In re Estate of Brown, 156 M 170, 477 P 2d 882.

CHAPTER 8—PROBATE PROCEEDINGS—PROBATE OF WILLS

Section 91-813. Petition by party requesting handwriting analysis.

91-814. Court to determine necessity of procedure, qualifications of expert.

91-815. Clerk to mail will—notice.

91-816. Expert to return will to clerk.

91-817. Disposition of written report.

91-818. Petitioner to pay all fees.

91-819. Report property of petitioner unless interested party shares fees.

91-813. Petition by party requesting handwriting analysis. In any proceeding involving the probate, either contested or uncontested, of a will, in which the signature of the testator or of any witness is an issue, any party to the proceeding may file with the court a verified petition requesting that the original will be delivered to a handwriting expert residing and having his place of business outside the state or outside the county, for an examination of any of the signatures on the will.

History: En. Sec. 1, Ch. 13, L. 1974.

Title of Act

An act providing a procedure permitting

a handwriting expert residing and having his place of business outside the county or state to examine the signatures on the original copy of a will.

91-814. Court to determine necessity of procedure, qualifications of expert. The court, upon notice and hearing, shall determine whether the procedure is justified by the circumstances of the case and whether the handwriting expert specified in the petition is a qualified professional handwriting expert.

History: En. Sec. 2, Ch. 13, L. 1974.

91-815. Clerk to mail will—notice. If the court grants the petition for delivery of the original will to a qualified handwriting expert residing and having his place of business outside the county or state, the clerk of court shall make at least two (2) photocopies of the original will, which photocopies shall remain in the custody of the clerk of court. The clerk shall mail the original will by registered mail, return receipt requested, to the handwriting expert specified in the order and shall give notice of the mailing by mailing copies of the order to each of the parties to the proceeding and to the handwriting expert.

History: En. Sec. 3, Ch. 13, L. 1974.

91-816. Expert to return will to clerk. Upon completion of his analysis, the handwriting expert shall return the original will to the clerk of court by registered mail, return receipt requested.

History: En. Sec. 4, Ch. 13, L. 1974.

91-817. Disposition of written report. Unless the court orders another disposition of the written report, the handwriting expert, upon completion of his analysis, shall mail his written report to the party who requested it.

History: En. Sec. 5, Ch. 13, L. 1974.

91-818. Petitioner to pay all fees. All fees and expenses arising from the procedure outlined in this act, including the cost of photocopying the will, the expense of all registered mailings and the handwriting expert's fee, shall be paid by the party requesting the handwriting analysis.

History: En. Sec. 6, Ch. 13, L. 1974.

91-819. Report property of petitioner unless interested party shares fees. Unless the court otherwise orders, the handwriting expert's written report shall be the sole and exclusive property of the party requesting it;

provided however, that upon demand and the payment of his prorata share of the fees and costs of the handwriting expert, as shall be determined by the court, any interested party may obtain a certified copy of the written report.

History: En. Sec. 7, Ch. 13, L. 1974.

CHAPTER 9—PROBATE PROCEEDINGS—CONTESTING PROBATE OF WILLS

91-901. (10032) Contestant to file grounds of contest, etc.

Burden of Proof—Undue Influence

Directed verdict upholding contested will was improper where there was evidence that testator was in a long period of declining physical and mental health due to terminal cancer and sedation, was influenced by a mutual funds salesman, and executed four wills within a six-month period, all of them disinheriting his natural children, making dispositions at great variance with previous wills, and tending to erode the estate. Estate of Hall v. Milk-

ovich, 158 M 438, 492 P 2d 1388, distinguishing In re Estate of Cocanougher, 141 M 16, 375 P 2d 1009.

Evidence Admissible — Testamentary Capacity

Hospital records of testator's terminal illness, during which he executed contested will, were relevant on issue of testamentary capacity and should have been admitted in will contest. Estate of Hall v. Milkovich, 158 M 438, 492 P 2d 1388.

CHAPTER 11—PROBATE PROCEEDINGS—CONTESTING WILLS AFTER PROBATE

91-1101. (10042) The probate may be contested within six months.

Issuance of Citation

Petition contesting will was properly dismissed where the citation was not issued within the statutory period follow-

ing admission of will to probate. In re Estate of Willner, 147 M 538, 416 P 2d 24, 25.

91-1102. (10043) Citation to be issued to parties interested.

Timely Issuance of Citation

Petition contesting will was properly dismissed where the citation was not

issued within statutory period following admission of will to probate. In re Estate of Willner, 147 M 538, 416 P 2d 24, 25.

CHAPTER 12—PROBATE OF LOST OR DESTROYED WILLS AND OF NUNCUPATIVE WILLS

91-1201. (10049) Proof of lost or destroyed will to be taken.

Presumption of Destruction

Those seeking to introduce a lost will must carry burden of proof that will was actually in existence or in existence in contemplation of law at the time of decedent's death; if will was last seen in

custody of deceased, petitioners must present clear, satisfactory and convincing evidence to overcome the rebuttable presumption that the deceased destroyed her will. In re Estate of Neuman, — M —, 518 P 2d 800.

91-1202. (10050) Must have been in existence at time of death.

Presumption of Destruction

Those seeking to introduce a lost will must carry burden of proof that will was actually in existence or in existence in contemplation of law at the time of decedent's death; if will was last seen in

custody of deceased, petitioners must present clear, satisfactory and convincing evidence to overcome the rebuttable presumption that the deceased destroyed her will. In re Estate of Neuman, — M —, 518 P 2d 800.

CHAPTER 13—PROBATE PROCEEDINGS—EXECUTORS AND
ADMINISTRATORS—ISSUANCE OF LETTERS
TESTAMENTARY AND OF ADMINISTRATION

91-1301. (10056) To whom letters on proved will to issue.

Duty of Court

Statute gives power to nominate executor to testator, so that court must appoint as executor person named in will unless he is incompetent under 91-1302. In re Estate of Graf, 150 M 577, 437 P 2d 371.

References

In re Maricich's Estate, 145 M 146, 400 P 2d 873.

91-1302. (10057) Who are incompetent as executors or administrators, etc.

Causes for Disqualifying

Fact that named executors may have used undue influence in obtaining property of testator before death, thereby giving rise to claim in behalf of estate against

executors, is not in itself evidence of want of integrity such as will disqualify executors. In re Estate of Graf, 150 M 577, 437 P 2d 371.

CHAPTER 14—PERSONS TO WHOM AND ORDER IN WHICH LETTERS
OF ADMINISTRATION ARE GRANTED

Section 91-1401. Order of persons entitled to administer—partner not to administer.
91-1405. Who are incompetent to act as administrators.

91-1401. (10068) **Order of persons entitled to administer—partner not to administer.** Administration of estate of all persons dying intestate and of all persons dying testate without appointing an executor who qualified for appointment must be granted to some one or more of the persons hereinafter mentioned or to persons nominated by them, and they are respectively entitled to preference thereto in the following order the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof;

1. The surviving husband or wife.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. A beneficiary under the will of the decedent.
9. The public administrator.
10. A creditor.
11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate.

History: En. Sec. 55, p. 253, L. 1877; re-en. Sec. 55, 2nd Div. Rev. Stat. 1879; amd. Sec. 55, 2nd Div. Comp. Stat. 1887; amd. Sec. 2430, C. Civ. Proc. 1895; re-en. Sec. 7432, Rev. C. 1907; re-en. Sec. 10068, R. C. M. 1921; amd. Sec. 1, Ch. 219, L. 1939; amd. Sec. 1, Ch. 68, L. 1969. Cal. C. Civ. Proc. Sec. 1365.

Amendments

The 1969 amendment inserted "and of all persons * * * qualified for appointment," after "persons dying intestate" and "or to persons nominated by them" after "hereinafter mentioned" and added "the relatives of the decedent * * * some portion thereof" at the end of the first paragraph; deleted ", or some competent person whom he or she may request to have appointed" from paragraph 1; inserted

new paragraph 8, and redesignated former paragraphs 8 to 10 as new paragraphs 9 to 11.

Creditor as Administrator

On claim for unpaid hospital expenses of decedent, proper remedy for hospital would have been to apply for letters of administration as creditor. *Daughters of Jesus v. Gee*, 153 M 342, 457 P 2d 471.

91-1405. (10072) Who are incompetent to act as administrators. No person is competent or entitled to serve as administrator or administratrix who is:

1. * * * [Same as parent volume.]

2. Not a bona fide resident of the state; but if a person otherwise entitled to serve is not a resident of the state, he may nominate a resident of the state to serve as administrator, and the court or judge must order letters issued to the nominee.

3. and 4. * * * [Same as parent volume.]

History: En. Sec. 59, p. 254, L. 1877; re-en. Sec. 59, 2nd Div. Rev. Stat. 1879; re-en. Sec. 59, 2nd Div. Comp. Stat. 1887; amd. Sec. 2434, C. Civ. Proc. 1895; amd. Sec. 1, p. 137, L. 1899; re-en. Sec. 7436, Rev. C. 1907; re-en. Sec. 10072, R. C. M. 1921; amd. Sec. 1, Ch. 59, L. 1969. Cal. C. Civ. Proc. Sec. 1369.

resident of the state to serve as administrator, and such person may be appointed, but no other nonresident than a surviving husband, wife, or child, or parent, or brother, or sister shall have such right to request an appointment, and" after "resident of the state," inserted, in place thereof, "he may nominate a resident of the state to serve as administrator," substituted "nominee" for "applicant" after "letters issued to the" and deleted "entitled thereto under the provisions of this chapter" at the end of paragraph 2.

Amendments

The 1969 amendment deleted "and either the husband, wife, or child, or parent, or brother, or sister of the deceased, he may request the court or judge to appoint a

CHAPTER 17—OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS

Section 91-1702. Bond of administrators and executors, form and requirement of—when not required.

91-1702. (10088) Bond of administrators and executors, form and requirement of—when not required. Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Montana, with two (2) or more sufficient sureties or a sufficient surety company, to be approved by the district court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than the value of the personal property and the annual rents and profits of real property belonging to the estate, nor more than twice the value of such personal property and rents and profits; provided that upon written request of all the heirs, devisees, or legatees and all being over eighteen (18) years of age and entitled to all of the estate upon distribution, the court may in its discretion fix the penalty of the bond at any sum less than the value of the

personal property, and the annual rents and profits of the real property belonging to the estate; and provided further that if, at the time of hearing any application for letters testamentary or of administration, it satisfactorily appears to the court or judge that the assets of the estate for which such letters of administration or letters testamentary are sought do not warrant the necessity of a bond on the part of the applicant, the court or judge may in its discretion order such letters to issue without bond; but such administrator or executor may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond as in other cases.

History: En. Sec. 75, p. 257, L. 1877; re-en. Sec. 75, 2nd Div. Rev. Stat. 1879; re-en. Sec. 75, 2nd Div. Comp. Stat. 1887; amd. Sec. 2471, C. Civ. Proc. 1895; re-en. Sec. 7452, Rev. C. 1907; amd. Sec. 1, Ch. 173, L. 1919; re-en. Sec. 10088, R. C. M. 1921; amd. Sec. 1, Ch. 167, L. 1937; amd.

Sec. 1, Ch. 119, L. 1963; amd. Sec. 17, Ch. 423, L. 1971. Cal. C. Civ. Proc. Sec. 1388.

Amendments

The 1971 amendment reduced the age specified in the first proviso to the second sentence from 21 to 18 years, and made minor changes in style.

CHAPTER 21—REMOVAL AND SUSPENSION OF EXECUTORS AND ADMINISTRATORS

91-2101. (10124) Suspension of powers of executor.

Causes for Removal

Administratrix who failed to file inventory and appraisalment within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs, failed

to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

91-2102. (10125) Executor to have notice of his suspension, etc.

Causes for Removal

Administratrix who failed to file inventory and appraisalment within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs, failed

to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

CHAPTER 22—INVENTORY AND APPRAISEMENT—POSSESSION OF ESTATE

Section 91-2212. Funds on deposit at financial institution—surviving spouse may withdraw—affidavit required.

91-2213. Affidavit sufficient to require release of funds—liability of financial institutions and their representatives discharged.

91-2201. (10129) Inventory to be returned, including the homestead.

Causes for Removal

Administratrix who failed to file inventory and appraisalment within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs, failed

to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

91-2212. Funds on deposit at financial institution—surviving spouse may withdraw—affidavit required. Whether a person dies testate or intestate, and irrespective of the character of his or her property, if the value of the estate does not exceed five thousand dollars (\$5,000), the spouse of the decedent may collect from any bank, banking institution, savings and loan association or credit union, any moneys held to the credit of the decedent not to exceed the total sum of one thousand dollars (\$1,000), without procuring letters testamentary or of administration, upon furnishing such bank or organization with an affidavit showing the right of the affiant to receive such money.

History: En. Sec. 1, Ch. 119, L. 1969.

Title of Act

An act providing that a surviving spouse

may withdraw funds from financial institutions without probate proceedings in certain cases.

91-2213. Affidavit sufficient to require release of funds—liability of financial institutions and their representatives discharged. The receipt of such affiant or affiants shall constitute sufficient acquittance for the payment of money made pursuant to the provisions of this act, and shall fully discharge such person, representative, officer, bank, institution, corporation or body from any further liability with reference thereto, without the necessity of inquiring into the truth of any of the facts stated in the affidavit. But such payment shall not preclude administration of the estate of the decedent when necessary to enforce payment of the decedent's debts.

History: En. Sec. 2, Ch. 119, L. 1969.

CHAPTER 24—PROVISION FOR SUPPORT OF FAMILY

91-2403. (10146) May make extra allowance.

Discretion of Court

Probate court did not abuse its discretion in denying widow's petition for family allowance under this section where probate court found that the widow had received from \$2800 to \$6400 per year as income from the assets of the estate,

and in addition received a monthly income of \$154 from Social Security and \$75 from the rental of her home, all of which income was sufficient for her care in the nursing home where she resided. Estate of Glein, — M —, 512 P 2d 1151.

CHAPTER 27—CLAIMS AGAINST ESTATE

91-2701. (10170) Notice to creditors, etc.

Time for Presenting Claims

All claims against estate arising from contract must be presented to executor

within four months of first publication of notice to creditors. Brown v. Midland Nat. Bank, 150 M 422, 435 P 2d 878.

91-2704. (10173) Time within which claims against an estate, etc.

Actual Notice Unnecessary

Bank which failed to present claim on note against decedent's estate within statutory time was barred where notice by publication appeared in only newspaper in

community of 1,800 citizens of which both bank and decedent were residents; bank's contention that it received no actual notice which could have been accomplished with ease and that to bar claim under such

circumstances was deprivation of property without due process of law was rejected. *Baker Nat. Bank v. Henderson*, 151 M 526, 445 P 2d 574.

Contract Claims

All claims against estate arising from contract must be presented to executor within four months of first publication of notice to creditors. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

Mechanic's Lien

A mechanic's lien under sections 45-501 to 45-512 is not a claim arising upon a contract within the meaning of this section and the lien is not lost because creditor's claim is not filed. *Hammer v. Chapin*, 256 F Supp 818, 820.

91-2709. (10178) Limitation of actions on rejected claim.

Exclusive Nature of Procedure

Rule 41(e), M. R. Civ. P., providing for dismissal of action for failure to serve summons as provided therein, does not apply to service of summons in suit on rejected claim in probate which is governed exclusively by statute providing for contesting rejected claims in probate. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

Suit after Discharge

Summons, in suit on rejected claim filed within three-month statutory limit, served

after discharge in probate was not substantial compliance with statutory requirement to "bring suit" within three months of rejection of claim. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

Variance between Claim and Suit

Claim sued upon must be within scope of claim presented to executor, so that action for breach of contract to bequeath could not be predicated upon creditor's claim to recover debt. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

91-2711. (10180) Claims must be presented before suit.

Claim for Hospital Expenses

In action to recover unpaid hospital expenses from decedent's heirs at law, who had distributed assets without having administrator appointed, trial court improperly granted relief to plaintiff hospital since it could not sue upon its claim until it first presented such claim to administrator; thus, proper remedy would have been for hospital to apply for letters of administration as creditor, and hospital's

attempted remedy circumvented statutory priorities for payment of debts. *Daughters of Jesus v. Gee*, 153 M 342, 457 P 2d 471.

Variance between Claim and Suit

Claim sued upon must be within scope of claim presented to executor, so that action for breach of contract to bequeath could not be predicated upon creditors' claim to recover debt. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

CHAPTER 28—SALES OF PROPERTY OF ESTATE IN GENERAL—BORROWING MONEY—SALES OF CERTAIN PERSONAL PROPERTY

91-2801. (10195) Estate chargeable with debts—no priority.

Hospital Expenses

In action to recover unpaid hospital expenses from decedent's heirs at law, who had distributed assets of decedent's estate without having administrator appointed, trial court improperly granted relief to plaintiff hospital since it could not sue upon its claim until it first presented such

claim to administrator; thus, proper remedy would have been for hospital to apply for letters of administration as creditor, and hospital's attempted remedy circumvented statutory priorities for payment of debts. *Daughters of Jesus v. Gee*, 153 M 342, 457 P 2d 471.

CHAPTER 30—SALES OF REAL ESTATE AND CONTRACTS FOR PURCHASE OF LAND

Section 91-3009. Contents of order of sale—conditions of sale—public or private.

91-3009. (10218) Contents of order of sale—conditions of sale—public or private. The order of sale must describe the lands to be sold

and the terms of sale which may be for cash, or for part cash and the balance on a credit not exceeding five (5) years where the sales price is five thousand dollars (\$5,000) or less, payable in gross or in installments, with interest, as the court or judge may direct. For sales where the sales price exceeds five thousand dollars (\$5,000), deferred payments may be extended not to exceed twenty (20) years. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court or judge otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court or judge must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court or judge, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court or judge may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, if the executor or administrator shall deem it to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court or judge, made on motion, after due notice by any party interested.

History: En. Sec. 194, p. 290, L. 1877; re-en. Sec. 194, 2nd Div. Rev. Stat. 1879; re-en. Sec. 194, 2nd Div. Comp. Stat. 1887; amd. Sec. 2678, C. Civ. Proc. 1895; re-en. Sec. 7569, Rev. C. 1907; re-en. Sec. 10218, R. C. M. 1921; amd. Sec. 1, Ch. 49, L. 1943; amd. Sec. 1, Ch. 64, L. 1969. Cal. C. Civ. Proc. Sec. 1544.

Amendments

The 1969 amendment inserted "where the sales price is five thousand dollars (\$5,000) or less," after "not exceeding five (5) years" in the first sentence; and inserted the present second sentence.

CHAPTER 31—MORTGAGING AND LEASING REAL ESTATE

Section 91-3108. Leasing—procedure to procure order—provisions and terms—execution—effect.

91-3108. (10256) Leasing—procedure to procure order—provisions and terms—execution—effect. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

1. to 3. * * * [Same as parent volume.]

4. At the time and place appointed in the order to show cause, or such other time and place to which the hearing may be postponed, the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court or judge may, in its or his discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for their services, not to exceed five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate

to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for ten years, except that a lease or contract providing for the exploration of the premises for oil, gas, coal or hydrocarbons may provide for a term of ten years and for as long thereafter as oil, gas, coal, or hydrocarbons shall be produced in commercial quantities, and may prescribe the other terms and conditions of such lease.

5. and 6. * * * [Same as parent volume.]

History: En. Sec. 2722, C. Civ. Proc. 1895; re-en. Sec. 7602, Rev. C. 1907; re-en. Sec. 10256, R. C. M. 1921; amd. Sec. 1, Ch. 113, L. 1923; amd. Sec. 1, Ch. 156, L. 1953; amd. Sec. 1, Ch. 217, L. 1973. Cal. C. Civ. Proc. Sec. 1579.

Amendments

The 1973 amendment inserted "coal" in two places in the last sentence of subdivision 4.

CHAPTER 32—GENERAL POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS

91-3202. (10258) Executors and administrators may sue and be sued.

Failure To Join Beneficiary

Although proper procedure was followed in bringing suit against administrator of estate without joining all beneficiaries, conduct of parties in perpe-

trating fraud on court required that judgment be vacated on motion of aggrieved beneficiary who was not party to suit. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

CHAPTER 33—CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS

Section 91-3302. Petition for executor or administrator to make conveyance and notice of hearing.

91-3302. (10269) Petition for executor or administrator to make conveyance and notice of hearing. On the presentation of a verified petition by the executor or administrator, or by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, shall appoint a time and place for hearing the petition, and shall order notice thereof to be served on the executor or administrator personally when he is not the petitioner, and a copy thereof served upon each known heir, or, in the event of minor or incompetent heirs, upon the duly appointed and qualified guardian for such incompetent or minor, not less than twenty (20) days prior to the date of said hearing; or the court may order notice by publication for four (4) successive weeks in such newspaper in the county as the court may designate, provided, however, that if such contract was of record at the date of the death of the person executing such contract, then, in that event, notice of such hearing may be given by serving such notice on the executor or administrator personally, when he is not the petitioner, and posting such notice in three (3) public places in the county where the court is held, for at least ten (10) days prior to the day fixed for the hearing; provided, further, that

if the written consent of all the known heirs over the age of eighteen (18) years and the guardian, duly authorized, of all minor or incompetent heirs be obtained and filed in the court before which said hearing is pending, then no other or further notices shall be required.

History: En. Sec. 237, p. 302, L. 1877; re-en. Sec. 237, 2nd Div. Rev. Stat. 1879; re-en. Sec. 237, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2751, C. Civ. Proc. 1895; re-en. Sec. 7615, Rev. C. 1907; re-en. Sec. 10269, R. C. M. 1921; amd. Sec. 1, Ch. 173, L. 1937; amd. Sec. 18, Ch. 423, L. 1971. Cal. C. Civ. Proc. Sec. 1598.

Amendments

The 1971 amendment reduced the age specified in the final proviso from 21 to 18 years, and made minor changes in style.

CHAPTER 34—LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS

91-3402. (10282) Executor or administrator to be charged, etc.

Collection of Assets

Executor was not liable for loss occasioned to estate by virtue of decedent's stockbroker's theft of decedent's securities, which theft occurred prior to the death of decedent but was not discovered until one year after decedent's death; the executor is responsible for the "assets" existing in the estate of the decedent at the time of death, and the only "asset"

of the estate existing at that time was a claim for the value of the securities stolen from decedent during his lifetime, which the executor attempted diligently to collect through instigation of receivership proceedings against brokerage firm owned by the decedent's stockbroker. In re Estate of Schueren, — M —, 512 P 2d 1283.

91-3407. (10287) Compensation of executors and administrators.

Neglect and Mismanagement of Estate

Removed administratrix and her attorneys who had failed to make money from sale of property available to heirs, failed to provide for interest on money from sale of property for benefit of estate, lost inheritance tax credit and allowed tax

penalties to be assessed against estate were properly awarded fees less than those provided for by statute which applies only to fees for successful completion of estate. In re Estate of Smith, 149 M 326, 426 P 2d 575.

CHAPTER 35—ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS

91-3501. (10288) Exhibit of receipts and disbursements, etc.

Inventory of Assets

Administratrix who failed to file inventory and appraisal within three months after appointment, failed to file first accounting within six months after appointment, failed to make money from sale of property available to heirs,

failed to provide estate with interest on money from sale of property, lost inheritance tax credit and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P 2d 575.

91-3507. (10294) Repealed.

Repeal

Section 91-3507 (Sec. 260, p. 307, L. 1877), relating to the rendering of ac-

counts after notice to creditors, was repealed by Sec. 1, Ch. 272, Laws 1969.

91-3516. (10303) Settlement of account to be conclusive, etc.

Effect of Fraud

Final decree of distribution and discharge in probate will not be set aside on

ground of inadvertence or fraud under statute or Rule 60(b), M. R. Civ. P., in absence of manifest abuse of court's dis-

cretion to grant relief thereunder in case where moving party had every opportunity to protect his claim in probate and

failed to do so. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

CHAPTER 36—DEBTS OF THE ESTATE—PAYMENT OF

91-3601. (10307) Order of payment of debts.

Circumvention of Payment Priorities

In action to recover unpaid hospital expenses from decedent's heirs at law, who had distributed assets of decedent's estate without having administrator appointed, trial court improperly granted relief to plaintiff hospital since it could not sue upon its claim until it first presented such

claim to administrator; thus, proper remedy would have been for hospital to apply for letters of administration as creditor, and hospital's attempted remedy circumvented statutory priorities for payment of debts. *Daughters of Jesus v. Gee*, 153 M 342, 457 P 2d 471.

91-3606. (10312) Provision for disputed and contingent claims.

Summons after Discharge

Summons, in suit on rejected claim filed within three-month statutory limit, served after discharge in probate was not substantial compliance with statutory require-

ment to "bring suit" within three months of rejection of claim and relieved executrix of statutory duty to pay amount of disputed claim into court. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

CHAPTER 39—FINAL DISTRIBUTION OF ESTATE —DISCHARGE OF EXECUTOR OR ADMINISTRATOR

Section 91-3906. Final settlement, order and discharge.

91-3906. (10332) Final settlement, order and discharge. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court or judge, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court or judge must make an order discharging him from all liability to be incurred thereafter. If the estate has not been distributed in its entirety, and the executor or administrator discharged within two (2) years from the date of initial appointment of the executor or administrator, the clerk of the district court shall advise the district judge thereof and the judge shall notify the executor, administrator and his attorney of record to appear before the court and show cause why the estate has not been distributed in its entirety and the executor or administrator discharged.

If after such show cause hearing, the judge determines that good cause does not exist for failure to distribute the estate, the judge shall make an order directing that the estate be distributed in its entirety within thirty (30) days and that the executor or administrator and his attorney shall receive no fee or other compensation from the estate.

History: En. Sec. 2886, C. Civ. Proc. 1895; re-en. Sec. 7696, Rev. C. 1907; re-en. Sec. 10332, R. C. M. 1921; amd. Sec. 1, Ch. 260, L. 1971. Cal. C. Civ. Proc. Sec. 1697.

Amendments

The 1971 amendment added the second sentence to the first paragraph; and added the second paragraph.

CHAPTER 42—SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATE

Section 91-4201. Court not to lose jurisdiction of trusts by distribution—accounts of trustees.

91-4201. (10352) Court not to lose jurisdiction of trusts by distribution—accounts of trustees. Where any trust has been created by or under any will to continue after distribution, the district court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust as provided in Title 86.

History: En. Sec. 2900, C. Civ. Proc. 1895; re-en. Sec. 7698, Rev. C. 1907; re-en. Sec. 10352, R. C. M. 1921; amd. Sec. 2, Ch. 24, L. 1969. Cal. C. Civ. Proc. Sec. 1699.

Amendments

The 1969 amendment added "as provided in Title 86" at the end of the first sentence; and deleted the former second through the fifth sentences. For text, see parent volume.

CHAPTER 43—PROBATE PROCEEDINGS, MISCELLANEOUS—CITATIONS—APPEALS, ETC.

Section 91-4321. Termination of life estate or joint tenancy.

91-4324. Validation of fiduciary sales before 1965.

91-4325. Validation of fiduciary sales before 1967.

91-4326. Validation of fiduciary sales before 1969.

91-4327. Validation of fiduciary sales before 1971.

91-4328. Validation of fiduciary sales before 1973.

91-4306. (10360) Citation—how issued.

Refusal to Issue

Where clerk of court mistakenly refused to issue citation pursuant to this section, resulting in lapse under statute of limitations, it was improper for the

district judge to issue nunc pro tunc order backdating such citation. *State ex rel. Craig v. District Court*, 153 M 427, 458 P 2d 608.

91-4321. (10375) Termination of life estate or joint tenancy. (1) to (3) * * * [Same as parent volume.]

(4) If no proceeding has been had or is pending to determine whether any inheritance tax is payable by reason of such death, the court or judge may determine in a proceeding under this section whether an inheritance tax is due by reason of the death of such person, and the amount thereof, if any. If it is desired to have the court or judge determine the liability for inheritance tax, and the amount thereof, appropriate allegations to that effect shall be included in the petition, and a copy of such petition, and notice of the time and place of hearing, shall be mailed to the state department of revenue by the clerk of the court, at least ten (10) days before the date set for hearing.

History: En. Sec. 2930, C. Civ. Proc. 1895; re-en. Sec. 7721, Rev. C. 1907; re-en. Sec. 10375, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1943; amd. Sec. 75, Ch. 391, L. 1973. Cal. C. Civ. Proc. Sec. 1723.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" near the end of subsection (4).

91-4324. Validation of fiduciary sales before 1965. All sales, provided no action is now pending to set aside such deed or conveyance, by trustees,

executors, administrators and guardians which previous to the effective date of this act, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed or conveyance to such purchaser, and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 60, L. 1965. defects and irregularities in such sales, containing a repealing clause.

Title of Act

An act validating deeds and conveyances in sales of land and personal property heretofore made by trustees, executors, administrators and guardians, curing

Repealing Clause

Section 2 of Ch. 60, Laws 1965 repealed all acts and parts of acts in conflict therewith.

91-4325. Validation of fiduciary sales before 1967. All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to January 1, 1967, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed or conveyance to such purchaser, and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 182, L. 1967.

Title of Act

An act validating deeds and conveyances in sales of land and personal prop-

erty made by trustees, executors, administrators and guardians prior to January 1, 1967, curing defects and irregularities in such sales.

91-4326. Validation of fiduciary sales before 1969. All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to January 1, 1969, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court

having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's, or guardian's deed or conveyance to such purchaser, and in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 75, L. 1969.

Title of Act

An act validating deeds and conveyances in sales of land and personal property

made by trustees, executors, administrators and guardians prior to January 1, 1969, curing defects and irregularities in such sales.

91-4327. Validation of fiduciary sales before 1971. All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to January 1, 1971, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed, or conveyance to such purchaser, and in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 98, L. 1971.

Title of Act

An act validating deeds and conveyances in sales of land and personal prop-

erty made by trustees, executors, administrators and guardians prior to January 1, 1971, curing defects and irregularities in such sales.

91-4328. Validation of fiduciary sales before 1973. All sales, provided no action is now pending to set aside such deed or conveyance, by trustees, executors, administrators and guardians which previous to January 1, 1973, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed or conveyance to such purchaser, and in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if

now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 81, L. 1973.

Title of Act

An act validating deeds and conveyances in sales of land and personal prop-

erty made by trustees, executors, administrators and guardians prior to January 1, 1973, curing defects and irregularities in such sales.

CHAPTER 44—INHERITANCE TAX

- Section 91-4411. Estate tax.
 91-4414. Exemptions from first \$25,000.
 91-4414.1. Discretionary waiver of inheritance tax of surviving spouse.
 91-4415. When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed.
 91-4416. Discount—interest.
 91-4417. Powers of representative in collection and payment of tax—collection from legatees or distributees.
 91-4418. Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest.
 91-4419. Bond for deferred payment of tax.
 91-4421. Payment of tax on transfer of securities by foreign representative—duty of holder of securities or assets of nonresident decedent—apportionment of deductions—information to be given department of revenue—amount of tax to be retained on delivery of assets—penalties.
 91-4423. Jurisdiction of district court—notice to department of revenue required before hearing.
 91-4425. Determination of tax due from estate of nonresident decedent—application—appeals.
 91-4426. Determination when application not made.
 91-4427. Special appraiser.
 91-4428. Duties, powers and compensation of appraisers.
 91-4429. Hearing by the court.
 91-4430. Notice of hearing.
 91-4431. Commissioner of insurance to value future estates, etc.
 91-4437. Order determining tax—contents.
 91-4438. Rehearing within sixty days.
 91-4439. Reappraisal in the district court within one year.
 91-4440. Collection of unpaid taxes.
 91-4442. Special administration to determine tax where transfer made in contemplation of death.
 91-4443. Public administrator's duty to investigate concerning tax—compensation.
 91-4444. State department of revenue to supervise inheritance tax.
 91-4445. Powers and duties of the department.
 91-4446. Powers and duties in nonresident estates.
 91-4447. Duty of the legal department of state.
 91-4448. Forms and blanks.
 91-4449. Duties of clerks of district courts.
 91-4450. Monthly reports of county treasurer—payment of collections to state department of revenue—interest on unpaid amounts.
 91-4451. Composition and compromise.
 91-4454. Employment of assistants by department of revenue—compensation.
 91-4455. Hearings by department of revenue—witnesses—false testimony as perjury—compensation.
 91-4459. Checking by county clerk of records and transfers—report to department of revenue.

- 91-4460. County clerk to furnish department of revenue description of property conveyed within three years of death of grantor.
- 91-4461. Department of revenue to appraise property and certify value.
- 91-4462. Form provided to grantee—contents.
- 91-4463. Certificate of inheritance tax due.
- 91-4464. Payment by grantee of inheritance tax due—receipts for payment.

91-4401. (10400.1) Taxes on transfer—when and how imposed.

Tenants in Common

Where husband died after he and his wife had conveyed land owned as tenants in common to sons, reserving a life estate with right of survivorship, wife, who obtained deceased husband's one-half inter-

est in land was subject to inheritance tax on husband's interest under section 91-4405, but sons' interests were not taxable until termination of the mother's life estate. In re Hess' Estate, 145 M 552, 403 P 2d 748.

91-4402. (10400.1) Transfers in contemplation of death.

Possession Postponed

Where husband and wife held real property as tenants in common, but transferred one half of the property to one son, and the other half to the other son, reserving a life estate in each piece of

property with right of survivorship, on father's death sons were not subject to inheritance tax until termination of the mother's intervening life estate. In re Hess' Estate, 145 M 552, 403 P 2d 748.

91-4405. (10400.1) Joint estates, government bonds, tenants, etc.

Applicable Property

Since the 1951 amendment, this section, including the clause excepting from taxation property shown to have belonged to the survivor and not the decedent, applies whether the property is tangible or intangible or whether the purchase price or the actual property is the subject of the joint tenancy. In re Parks' Estate, 145 M 333, 401 P 2d 83.

Corporate Stock

Corporate stock registered in both the husband's and wife's names, but purchased by the wife, and in her possession, was not subject to inheritance tax on death of husband. In re Parks' Estate, 145 M 333, 401 P 2d 83.

Nontaxable Transfers

The 1951 amendment, stipulating that upon the death of one of the spouses, "the right of the survivor or survivors to the immediate possession or ownership is a taxable transfer," when read in conjunction with the clause excepting property shown to have belonged originally to the survivor, shows that a "transfer" is taxed, but what in reality is not a "transfer" is not taxed. In re Parks' Estate, 145 M 333, 401 P 2d 83.

References

In re Hess' Estate, 145 M 552, 403 P 2d 748.

91-4407. (10400.1) Tax on clear market value—deductions.

Clear Market Value

Clear market value as used in this section means net value in the open market as determined by price willing but not obligated buyer would pay and willing but not obligated seller would accept, with both parties knowing all pertinent facts affecting value. In re Estate of Power, 156 M 100, 476 P 2d 506.

Valuation of United States Treasury

bonds redeemable at par in discharge of federal estate tax liability must be based on clear market value on date of decedent's death for purposes of this section rather than on par value. In re Estate of Power, 156 M 100, 476 P 2d 506.

References

Cited in Salvation Army v. State, 144 M 415, 396 P 2d 463, 466.

91-4411. (10400.3a) Estate tax. (a). In addition to the inheritance taxes hereinabove imposed, an estate tax is hereby imposed upon the transfer of the estate of every decedent leaving an estate which is subject to the federal estate tax imposed by the United States of America under the applicable provisions of the Internal Revenue Code and which

has, in whole or in part, a taxable situs in this state. The tax hereby imposed upon the transfer of each such estate shall be equal to the maximum tax credit allowable for state death taxes against the federal estate tax imposed with respect to the portion of the decedent's estate having a taxable situs in this state, less the inheritance taxes, if any, due this state, it being the purpose and intent of this section to impose only such additional taxes hereunder as may be necessary to give this state the full benefit of the maximum tax credit allowable against the federal estate tax imposed with respect to a decedent's estate which has a taxable situs in this state. If only a portion of a decedent's estate has a taxable situs in this state, such maximum tax credit shall be determined by multiplying the entire amount of the credit allowable against the federal estate tax for state death taxes by the percentage which the value of the portion of the decedent's estate which has a taxable situs in this state bears to the value of the entire estate. The tax imposed herein shall be collected by the several county treasurers or the state board of equalization for deposit with the state treasurer and distributed as hereafter provided. For the purpose of this tax, the taxable situs of property shall be the same as the taxable situs for inheritance tax purposes.

(b) and (c). * * * [Same as parent volume.]

(d) Lien. Said taxes and interest shall be, and remain, a lien on the property for a period of ten (10) years from the date of death, unless sooner paid.

(e). * * * [Same as parent volume.]

(f) Duplicate returns. It shall be the duty of the legal representative of the estate of any decedent, whose estate may be subject to the payment of a United States estate tax, to file duplicates of the United States estate tax returns with the district court of the county in which such estate is being probated. He shall also file with such court a certificate or other evidence from the bureau of internal revenue showing the amount of the United States estate tax as computed by that department. The district court shall hear all parties desiring to be heard with respect to the amount of state estate tax and shall enter an order determining such tax and the amount thereof so due and payable. Any person in interest aggrieved by such determination shall have the same right of rehearing and appeal as is now provided for in the determination of inheritance taxes.

(g) Intent of subdivisions (a) to (h). It is hereby declared to be the intent and purpose of subdivisions (a) to (h) to obtain for this state the benefit of the credit allowed under the provisions of said Internal Revenue Code, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose.

(h). * * * [Same as parent volume.]

History: En. Sec. 2, Ch. 48, Ex. L. 1933; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971.

Amendments

The 1969 amendment substituted "Internal Revenue Code of 1954" for "United

States Revenue Act of 1926" in subsection (a); and "Internal Revenue Code" for "United States Revenue Act" in subsections (a) and (g).

The 1971 amendment rewrote subsection (a), for previous text of which see parent volume; inserted the ten-year limi-

tation in subsection (d); deleted "who was a resident of this state at the time of his death" after "decedent" in the first sentence of subsection (f); and made minor changes in phraseology.

Effective Dates

Section 2 of Ch. 360, Laws 1969 pro-

vided the act should be in effect from and after its passage and approval. Approved March 14, 1969.

Section 2 of Ch. 28, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved February 16, 1971.

DECISIONS UNDER FORMER LAW

Reference to Federal Act

Fact that 1926 Revenue Act, formerly referred to in this section, has been repealed and 1939 Act has been passed in

its place in no way affects validity or effectiveness of this section. In re Estate of McLaughlin, 154 M 318, 462 P 2d 882.

91-4414. (10400.4) **Exemptions from first \$25,000.** The following exemptions from the tax are hereby allowed, the exemption allowed to each person, institution, association, corporation and body politic to be taken out of the first twenty-five thousand dollars passing by any such transfer to such person, institution, association, corporation or body politic:

(1) *** [Same as parent volume.]

(2) \$25,000; \$5,000; \$2,000 exempt, when. Property of the clear value of twenty-five thousand dollars (\$25,000), transferred to the wife or to the husband of the decedent, five thousand dollars (\$5,000) transferred to each minor lineal issue of the decedent, or any minor child adopted as such in conformity with law, or any minor child to whom such decedent for not less than ten (10) years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth (15) birthday, and was continuous for ten (10) years, or any minor lineal issue of such adopted or mutually acknowledged child, and two thousand dollars (\$2,000) transferred to each of the lineal issue who have attained majority and to each of the other persons who have attained majority described in the first subdivision of section 91-4409 shall be exempt. Such exemption to the wife or husband of the decedent shall include all statutory dower, curtesy and other allowances. Any child of the decedent shall be entitled to credit for so much of the tax paid by the wife or husband as applied to any property which shall thereafter be transferred by or from such husband or wife to any such child, provided the husband or wife does not survive said decedent to exceed ten years.

(3) and (4) *** [Same as parent volume.]

History: En. Sec. 4, Ch. 65, L. 1923; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969; amd. Sec. 1, Ch. 317, L. 1973; amd. Sec. 1, Ch. 195, L. 1974.

Amendments

The 1965 amendment increased exemptions specified in the first sentence of paragraph (2) from \$17,500 to \$20,000 for the wife of the decedent, and from \$5,000 to \$10,000 for the husband of the decedent.

The 1969 amendment increased exemptions specified in the first sentence of paragraph (2) from \$10,000 to \$20,000 for the husband of decedent; inserted \$5,000 exemption for transfers to children; and included decedent's lineal issue who have attained majority under the \$2,000 exemption.

The 1973 amendment inserted "minor" before "child" in two places and before "lineal issue" in one place, all in the first sentence of paragraph (2); inserted "who have attained majority" after "other per-

sons" near the end of the first sentence of paragraph (2); substituted references to the husband or wife of the decedent for "widow" in four places in the second and third sentences of paragraph (2); inserted "curtesy" in the second sentence

of paragraph (2); and made a minor change in phraseology.

The 1974 amendment increased the exemption specified in the first sentence of paragraph (2) from \$20,000 to \$25,000 for the surviving spouse.

91-4414.1. Discretionary waiver of inheritance tax of surviving spouse. Notwithstanding any provision of law or statute in conflict herewith, the state department of revenue, in its discretion, is authorized to issue a waiver of inheritance tax in the event of the death of any person leaving any real property or personal property, or both, in joint tenancy with a surviving spouse if the value of the property of the decedent is less than the inheritance exemption allowed by law to the surviving spouse.

History: En. Sec. 1, Ch. 147, L. 1969; amd. Sec. 76, Ch. 391, L. 1973.

Title of Act

An act allowing the state board of equalization, in its discretion, to issue a waiver of inheritance tax in the event of the death of any person leaving any real property or personal property, or both, in

joint tenancy with a surviving spouse if the value of the property of the decedent is less than the inheritance exemption allowed by law to the surviving spouse.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization."

91-4415. (10400.5) When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed. All taxes imposed by this act shall be due and payable at the time of the death of the decedent, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred for a period of ten (10) years from the time of the death of the decedent, whether said death occurred before or after the effective date of this act, unless sooner paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment.

The tax shall be paid to the state department of revenue for transmittal to the state treasurer or to the treasurer of the county in which the district court is situated having jurisdiction as herein provided, and if paid to the county treasurer said treasurer shall receipt therefor, making five copies thereof, and distribute said copies as follows: Original receipt, to the clerk of the district court; first copy, to the executor, administrator, trustee, or person paying said tax; second copy, attached to and mailed with the report required by section 91-4450, as amended, to the state department of revenue; third copy, to the county clerk and recorder; fourth copy, retained by the treasurer on file in his office. The copy of the receipt given to the executor, administrator, or trustee shall be a proper voucher in the settlement of his accounts.

No executor, administrator, or trustee shall be entitled to a final accounting of an estate, in settlement of which a tax is due under the provisions of this act, unless he shall produce such receipt or a certified copy thereof or unless a bond shall have been filed as prescribed by section 91-4419.

History: En. Sec. 5, Ch. 65, L. 1923; amd. Sec. 1, Ch. 16, L. 1951; amd. Sec. 1, Ch. 99, L. 1965; amd. Sec. 1, Ch. 34, L. 1971; amd. Sec. 77, Ch. 391, L. 1973.

Amendments

The 1965 amendment inserted "whether said death occurred before or after the effective date of this act" in the first paragraph.

The 1971 amendment rewrote the second paragraph to provide for payment to the state board of equalization, to provide for quintuplicate instead of triplicate re-

ceipts from the county treasurer, and to revise the distribution of copies of the receipts. For previous text, see parent volume.

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places in the second paragraph.

Effective Date

Section 2 of Ch. 34, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved February 18, 1971.

91-4416. (10400.6) Discount—interest. If such tax is paid within eighteen (18) months from the accruing thereof, a discount of five per cent (5%) shall be allowed and deducted therefrom. The deduction of this discount of five per cent (5%) shall be accomplished by paying within the eighteen (18) month period from the date that the tax accrues an amount equal to ninety-five per cent (95%) of the total tax declared due by the person making payment. If such tax is not paid within eighteen (18) months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per cent (10%) per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax shall not be determined and paid as herein provided, in which case interest at the rate of six per cent (6%) shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per cent (10%) shall be charged, provided that litigation to defeat the payment of the tax shall not be considered necessary litigation. In all cases when a bond shall be given under the provisions of section 91-4419, interest shall be charged at the rate of six per cent (6%) after one (1) year from the date of death, until the date of payment thereof.

History: En. Sec. 6, Ch. 65, L. 1923; amd. Sec. 1, Ch. 15, L. 1967.

Amendments

The 1967 amendment inserted the figures in parentheses and added the present second sentence.

91-4417. (10400.7) Powers of representative in collection and payment of tax—collection from legatees or distributees. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor, or trustee, having in charge or in trust any legacy or property for distribution, subject to such tax, shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof, from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this law, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out

of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor, or trustee, and the tax shall remain a lien or charge on such real property for the period provided in section 91-4415, and the payment thereof shall be enforced by the executor, administrator, or trustee in the same manner that payment of the legacy might be enforced, or by the attorney general under section 91-4440. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor, or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment if the case require it, of the sum to be paid into the hands of such legatees, and for such further order relative thereto as the case may require.

History: En. Sec. 7, Ch. 65, L. 1923; Amendment
amd. Sec. 2, Ch. 99, L. 1965.

The 1965 amendment substituted "for the period provided in section 91-4415" for "until paid" following "charge on such real property" in the fifth sentence.

91-4418. (10400.8) Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest. If any debt shall be proved against the estate of the decedent, after the payment of any legacy or distributive share thereof, from which any such tax has been deducted, or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required by the order of the district court having jurisdiction of the tax so deducted or paid, to refund the amount of such debts or any part thereof, an equitable proportion thereof shall be repaid to such person by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or state treasurer, or by them, in the proper proportionate shares, if it has been so paid.

Any person from whom such tax is or may be due may make an estimate of and pay the same to the clerk of court, who shall receipt therefor, at any time before the same is determined by the court, and shall thereupon be relieved from any interest or penalty upon the amount so paid in the same manner as if the tax were then determined. In the event the person making payment has done so in accordance with the provisions of section 91-4416, pertaining to the allowance of a five per cent (5%) discount, the person making payment shall be relieved from any interest or penalty and shall be allowed the five per cent (5%) discount upon the amount which he so declared due as his inheritance tax liability. The tax may be declared to be due by the filing with the clerk of court of a statement of such declaration or by paying the amount estimated by the taxpayer to be due. The money shall be paid to the clerk of the district court who must deposit same with the state department of revenue. The clerk of the district court shall pay the collections to the state department of revenue on or before the fifth day of the month following the collection.

As soon as the correct amount of inheritance tax has been determined, any excess so paid shall be refunded to the person so paying or entitled

thereto by the state department of revenue based upon the filing of a properly documented claim by the clerk of court.

History: En. Sec. 8, Ch. 65, L. 1923; amd. Sec. 1, Ch. 47, L. 1935; amd. Sec. 7, Ch. 126, L. 1963; amd. Sec. 2, Ch. 15, L. 1967; amd. Sec. 1, Ch. 36, L. 1971; amd. Sec. 1, Ch. 316, L. 1973; amd. Sec. 78, Ch. 391, L. 1973.

Compiler's Notes

This section was amended twice in 1973, once by Ch. 316 and once by Ch. 391. Neither amendatory act mentioned the other. Since Ch. 316 included the changes made by Ch. 391, the compiler has used the text of Ch. 316 above.

Amendments

The 1967 amendment inserted the second and third sentences in the second paragraph.

The 1971 amendment deleted "for credit to the clerk of the district court's deposit or trust fund until the correct amount of the tax has been determined" from the end of the fourth sentence of the second paragraph; inserted in the second paragraph a fifth sentence reading "The county treasurer shall include such collections in the next payment he makes to the state board of equalization pursuant to section 91-4450"; substituted "by the state board of equalization based upon the filing of a

properly documented claim by the clerk of court" at the end of the section for "by such clerk of court out of said trust fund"; and deleted "and the county treasurer shall receipt for the amount of the inheritance tax so determined by the court" from the end of the section.

Chapter 316, Laws of 1973, substituted "the state department of revenue" at the end of the fourth sentence of the second paragraph for "the county treasurer"; substituted the present fifth sentence of the second paragraph for the fifth sentence inserted by the 1971 amendment; made a separate paragraph of the final sentence of the second paragraph; and substituted "department of revenue" for "board of equalization" in the third paragraph.

Chapter 391, Laws of 1973, substituted "department of revenue" for "board of equalization" in the fifth sentence of the second paragraph as inserted by the 1971 amendment and deleted by Ch. 316, and in the present third paragraph.

Effective Date

Section 3 of Ch. 15, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved February 3, 1967.

91-4419. (10400.9) Bond for deferred payment of tax. Any beneficiary of any property chargeable with a tax under this act, and any executors, administrators and trustees thereof, may elect, within eighteen months from the date of the death of decedent or transfer thereof as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. The person or persons so electing shall give a bond to the state in a penalty of three times the amount of any such tax, with such sureties as the district court of the proper county or the state department of revenue, as the case may be, may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the district court, or in the office of the state treasurer as the case may be. Such bond must be executed and filed and a full return of such property upon oath made to the district court within eighteen months from the date of the death of decedent or transfer as herein provided, and such bond must be renewed every five years, and said deferred tax shall bear interest at six per cent per annum after such eighteen months.

History: En. Sec. 9, Ch. 65, L. 1923; amd. Sec. 79, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" in the second sentence.

91-4421. (10400.11) Payment of tax on transfer of securities by foreign representative—duty of holder of securities or assets of nonresident decedent—apportionment of deductions—information to be given department of revenue—amount of tax to be retained on delivery of assets—penalties. (1) * * * [Same as parent volume.]

(2) No safe deposit company, bank, or other institution, person or persons, holding securities or assets of a nonresident decedent, nor any corporation organized under the laws of this state, in which a nonresident decedent held stock, bonds, mortgages, or other securities, at his decease, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the state department of revenue at least ten (10) days prior to the said transfer; nor shall any such safe deposit company, bank, or other institution, person or persons, nor any corporation, deliver or transfer any securities or assets of the estate of a nonresident decedent without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of the inheritance tax laws, without an order from the proper court authorizing such transfer; and it shall be lawful for the state department of revenue, personally or by representative, to examine said securities or assets at any time before such delivery or transfer. Failure to serve such notice or to allow such examination or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe deposit company, trust company, bank, or other institution, person or persons, or such corporation, liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of the inheritance tax laws. The state department of revenue may issue a certificate authorizing the transfer of any such stock, securities or assets whenever it appears to the satisfaction of the said board that no tax is due thereon; provided, however, that the foregoing provisions shall not apply to shares of stock in any Montana corporation held by a nonresident of Montana at the time of his death whose death occurred on or after January 30, 1945, and who was at the time of his death domiciled in any other district or state of the United States, provided reciprocal rights are granted by such district or state of domicile similar to section 91-4413, and in such event this subsection (2) shall not apply to the transfer of stocks, bonds, mortgages or other securities exempt from taxation under the provisions of section 91-4413, and a Montana corporation, or its agent, may transfer stocks, bonds, mortgages and other securities without any liability for the tax imposed under the provisions of the inheritance tax laws where there are reciprocal rights as set forth in section 91-4413, and in such event no application for consent to transfer such stock need be made to the state department of revenue of the state of Montana, and the corporation, or its duly authorized transfer agent may transfer such shares of stock upon its books without any such application or consent to transfer.

(3) * * * [Same as parent volume.]

(4) The state department of revenue shall require such reports and information and shall make such orders, rules, and regulations as it may deem necessary to enable the department to secure the necessary information from domestic corporations, and to ascertain the amount of and collect such tax; and no holding company or other corporation subject to the provisions of this section shall deliver or transfer any such stocks, bonds, mortgages, or other securities of a Montana corporation without retaining a sufficient portion thereof to pay any tax which may thereafter be assessed under the provisions of this act on account of such transfer, except upon order of the proper court or a certificate of consent of the state department of revenue.

(5) * * * [Same as parent volume.]

History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" throughout subsections (2) and (4).

91-4423. (10400.13) **Jurisdiction of district court—notice to department of revenue required before hearing.** The district court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws, and to do any act in relation thereto authorized by law to be done by a district court in other matters or proceedings coming within its jurisdiction; and if two or more district courts shall be entitled to exercise any such jurisdiction, the district court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other district court.

Before any decree determining inheritance tax in any estate shall be made by the court, the court shall require proof that due notice has been given to the state department of revenue before the hearing upon the petition to have inheritance tax determined, whether such hearing be at the time of the hearing on the final account or otherwise; and the court shall likewise require proof that a copy of such petition has been given to the department not later than the time of giving the notice; and, before the time fixed in said notice, said department shall cause to be filed, with the clerk of the district court, a certificate signed by the department stating that the amount of the inheritance tax determined to be due the state of Montana as appearing in the report or petition, has been properly computed therein or, if no tax is due, such certificate shall so state; and, if the department shall object to the amount of the tax so computed, the department shall, before the time fixed for the hearing, file with the clerk of the court its written objections thereto, setting forth therein the nature of the objections. If neither such certificate nor objections shall have been filed at the time fixed for the hearing, it shall be conclusively presumed that the department concurs in the amount so computed.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; amd. Sec. 1, Ch. 79, L. 1951; amd. Sec. 81, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" throughout the second paragraph.

91-4425. (10400.15) **Determination of tax due from estate of non-resident decedent—application—appeals.** (1) Any personal representative, trustee, heir, devisee or legatee of a nonresident decedent leaving no estate requiring administration in this state, desiring to transfer any stocks, bonds, mortgages or other securities, or other personal property in this state or within the jurisdiction of this state, may make application to the state department of revenue for the determination whether there is any tax due upon account of the transfer thereof, and the amount of any such tax, and such applicant shall furnish to the state department of revenue therewith, an affidavit setting forth a description and statement of the property owned by the decedent situated within this state, or within its jurisdiction at the time of his death, the true value of said property at the time of decedent's death; a description and statement of the true value of all property owned by the decedent at the time of his death situated outside of this state, and without its jurisdiction; and containing a schedule or statement of all valid claims against the estate of the decedent, including the expenses of his last illness, funeral expenses and expenses of administering his estate. Such applicant shall also, at the same time, furnish the state department of revenue with a certified copy of the last will of the decedent, in case he died testate, or an affidavit setting forth the names, ages, and residence of the heirs at law of decedent in case he died intestate, and the proportion of the entire estate of said decedent inherited by each of said persons, and the relation, if any, which each legatee, devisee, heir, or transferee sustained to the decedent, or person from whom the transfer was made. Such affidavit shall be subscribed and sworn to by the personal representative of the decedent, or some other person having knowledge of the facts therein set forth.

(2) The statement contained in any affidavits, statements or schedules as to values, or otherwise, shall not be binding upon the state department of revenue in case they believe the same to be erroneous or untrue. From the information so furnished them and such other information as they may be able to obtain with reference thereto, the state department of revenue shall, with reasonable diligence, proceed to ascertain and determine the amount of tax, if any, due under the provisions of this act, and notify the person making the application of the amount of the tax so ascertained and determined to be due; or in case there is no tax to be paid, the state department of revenue shall issue a consent to the transfer of the property so owned by the decedent.

(3) Any person aggrieved by the determination of the state department of revenue in any matter herein provided for in this section may, within thirty (30) days thereafter, appeal to the district court of Lewis and Clark county, by serving on the state department of revenue a notice in writing setting forth his objections to such determination, and by filing

such notice, after so serving the same, in the office of the clerk of such court, and thereupon, and within ten (10) days after the service of such notice on them the state department of revenue shall transmit full and complete copies of all original papers and records which have been filed with them in relation to such application, to the clerk of said district court, and thereupon the said district court shall have jurisdiction of such application and proceeding. Upon ten days' notice given by either applicant or the state department of revenue, the matter may be brought on for hearing and determination by said court, either in term time or in vacation, at a general or special term of court, or at chambers, as may be directed by the order of the court.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; amd. Sec. 82, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" throughout the section.

91-4426. (10400.16) Determination when application not made. When-ever any nonresident decedent, leaving no estate requiring administration in this state, shall leave any stocks, bonds, mortgages, or other securities, or other personal property within the state or within the jurisdiction thereof, and no personal representative, trustee, heir, devisee, or legatee of such nonresident decedent has made application to the state department of revenue for the determination as to whether there is any tax due for the transfer thereof and the amount of such tax, if any, the state department of revenue, upon such matter being called to its attention, shall make an order, and cause a copy thereof to be served upon the personal representative, trustee, heirs, devisees or legatees of such nonresident decedent, ordering and directing that a statement and return, under oath, containing the statements and information prescribed in section 91-4425, be filed with such board within sixty (60) days from the date of such order, or within such further time as the state department of revenue may grant therefor; and if such statement is not filed with the state department of revenue within such time the state department of revenue may then procure such information in any manner it may deem advisable. Upon the filing of such statement, or the procuring of such information by the state department of revenue in the event of a failure to file the same in compliance with such order, the state department of revenue shall proceed in the same manner as prescribed by section 91-4425, and all provisions thereof with reference to hearings and appeals shall be applicable thereto.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; amd. Sec. 83, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" throughout the section.

91-4427. (10400.17) Special appraiser. The district court, upon the application of any interested party, including the state department of revenue, shall appoint a competent person as special appraiser to fix the fair market value at the time of the transfer thereof of the property of persons whose estate shall be subject to the payment of any tax imposed by this act.

History: En. Sec. 13, Ch. 65, L. 1923; amd. Sec. 2, Ch. 141, L. 1927; amd. Sec. 84, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization."

91-4428. (10400.18) Duties, powers and compensation of appraisers. Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state department of revenue, and to such persons as the district court may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said district court, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as the said district court may order or require. Every appraiser shall be paid on the certificate of the district court at the rate of not to exceed ten dollars (\$10.00) per day for every day actually and necessarily employed in such appraisal, and shall receive his actual and necessary traveling expenses, and witnesses shall be allowed the same fees as are allowed witnesses in civil actions in courts of record and the same shall be paid by the executor, administrator or trustee of such estate in the same manner as provided for the payment of other administration expenses.

History: En. Sec. 14, Ch. 65, L. 1923; amd. Sec. 4, Ch. 150, L. 1925; amd. Sec. 85, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" in the first sentence.

91-4429. (10400.19) Hearing by the court. The report of the special appraiser shall be made in triplicate, and not less than ten (10) days before the hearing thereon one of said triplicates shall be filed in the office of the district court, one to the administrator or the executor, and the other shall be mailed to the state department of revenue. At the time and place of hearing the administration account, the district court shall examine such report, and from the report and other proofs relating to any such estate shall forthwith determine the cash value of such estate and the amount of tax to which the same is liable; or, the district court without appointing such appraiser may at the time so fixed hear the evidence and determine the cash value of such estate and the amount of tax to which the same is liable.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; amd. Sec. 86, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" at the end of the first sentence.

91-4430. (10400.20) Notice of hearing. Notice of such hearing to determine the inheritance tax shall be given in the same manner and may be included in the notice of hearing the administration account, as pro-

vided by law. A copy of the application for exclusion of any property to avoid inheritance tax thereon shall be given with notice of hearing thereof, and notice of any such hearing shall be mailed to the state department of revenue not less than fifteen (15) days before such hearing, upon notice forms provided by the department and containing such information as it may require.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; amd. Sec. 1, Ch. 80, L. 1949; amd. Sec. 87, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "the department" for "board of equalization" and "said board" in the second sentence.

91-4431. (10400.21) Commissioner of insurance to value future estates, etc. The commissioner of insurance shall, on application of any district court or of the state department of revenue, determine the value of any such future or contingent estates, income, or interests therein limited, contingent, dependent, or determinable upon the life or lives of the person or persons in being, upon the facts contained in the district court's finding and determination and contained in such special appraiser's report, and upon the facts certify the same to the district court or to the state department of revenue, and his certificate shall be presumptive evidence that the method of computation adopted therein is correct.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; amd. Sec. 88, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places.

91-4432. (10400.22) Appraisal at clear market value at time of death, etc.

References

In re Hess' Estate, 145 M 552, 403 P 2d 748.

91-4437. (10400.27) Order determining tax—contents. Upon the determination by the district court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be substantially in the form prescribed by the state department of revenue. A copy of the same shall be delivered or mailed to the county treasurer, the administrator or executor, and the state department of revenue, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed, and receipts are filed with such court showing the payment of all such taxes, or proof is filed showing that the bond authorized by section 91-4419 has been given.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; amd. Sec. 1, Ch. 161, L. 1971; amd. Sec. 89, Ch. 391, L. 1973.

Amendments

The 1971 amendment deleted "the state

treasurer" after "the county treasurer" in the third sentence.

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places.

91-4438. (10400.28) Rehearing within sixty days. The attorney general, state department of revenue, public administrator, county attorney, or any person dissatisfied with the appraisement or assessment and determination of such tax may apply for a rehearing thereof before the district court within sixty (60) days from the fixing, assessing and determination of the tax by the district court as herein provided on filing a written notice which shall state the grounds of the application for a rehearing. The rehearing shall be upon the records, proceedings, and proofs had and taken on the hearing as herein provided unless additional or newly discovered evidence be alleged therefor, and a new trial shall not be had or granted unless specially ordered by the district court.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; amd. Sec. 90, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" near the beginning of the section.

91-4439. (10400.29) Reappraisal in the district court within one year. Within one year after the entry of an order or decree of the district court determining the value of an estate and assessing the tax thereon, the attorney general or the state department of revenue may, if he (or they) believes that such appraisal, assessment, or determination has been erroneously, fraudulently or collusively made, make application to the district judge for a reappraisal thereof. The district court to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties, shall give the notice and receive the compensation provided by sections 91-4428 to 91-4439, inclusive. Such compensation shall be payable by the county treasurer out of any funds he may have on account of any tax imposed under the provisions of this act, upon the certificate of the district judge. The report of such appraiser shall be filed in the office of the clerk of the district court, and thereafter the same proceedings shall be taken and had by and before such district court as herein provided to be taken and had by and before the said court. The determination and assessment of such district court shall supersede the former determination and assessment of such court, and shall be filed in the office of the county treasurer, state treasurer, and state department of revenue.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; amd. Sec. 91, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places.

91-4440. (10400.30) Collection of unpaid taxes. If any county treasurer, state treasurer, or the state department of revenue shall have reason

to believe that any tax is due and unpaid under the provisions of this act, after the refusal or neglect of any person liable therefor to pay the same, he or they, shall notify the attorney general in writing of such failure or neglect, and the attorney general, if he have probable cause to believe that such tax is due and unpaid, shall apply to the district court for a citation citing the person liable to pay such tax to appear before the court on the day specified, not more than three months from the date of such citation, and show cause why the tax should not be paid. The judge of the district court upon such application and whenever it shall appear to him that any such tax accruing under this act has not been paid as required by law, shall issue such citation, and the service of such citation and the time, manner and proof thereof, and the hearing and determination thereof, shall conform as near as may be to the provisions of the laws governing probate practice of this state, and whenever it shall appear that any such tax is due and payable, and the payment thereof cannot be enforced under the provisions of this act, in said district court, the person or corporation from whom the same is due is hereby made liable to the state for the amount of such tax, and it shall be the duty of the attorney general, in the name of the state, to sue for and enforce the collection of such tax, and it is made the duty of the county attorney of the county to appear for and act on behalf of any county treasurer, who shall be cited to appear before any district court under the provisions of this act.

History: En. Sec. 16, Ch. 65, L. 1923; **Amendments**
amd. Sec. 92, Ch. 391, L. 1973.

The 1973 amendment substituted "department of revenue" for "board of equalization" near the beginning of the section.

91-4442. (10400.32) Special administration to determine tax where transfer made in contemplation of death. Where it appears that the estate of a deceased person subject to the inheritance tax laws was transferred in contemplation of the death of the grantor without the adjustment and payment of the inheritance taxes and no application for such adjustment is made within six months after the demise of such grantor, the public administrator of the proper county shall notify the state department of revenue and on its order make application for and shall be entitled to such general or special administration as may be necessary for the purpose of the adjustment and payment of the inheritance taxes provided by law and shall administer such estate the same as other estates are administered as though such estate had not been transferred by the grantor.

History: En. Sec. 17, Ch. 65, L. 1923; **Amendments**
amd. Sec. 93, Ch. 391, L. 1973.

The 1973 amendment substituted "department of revenue" for "board of equalization."

91-4443. (10400.43) Public administrator's duty to investigate concerning tax—compensation. It shall be the duty of the public administrator, under the general supervision of the state department of revenue, and with the assistance of the county attorney, when required by the department or district judge, to investigate the estates of deceased persons within his county and to appear for and act in behalf of the county and state in the

district court in such estates as the court may in its discretion deem necessary, and for such services the public administrator shall be entitled to five per cent of the gross inheritance tax as determined in each such estate, to be paid by the county treasurer out of the inheritance tax funds upon an order of the district judge, provided that the minimum fee for each such estate shall not be less than five dollars, and that it shall not exceed twenty-five dollars; but in cases of unusual difficulty, in estates of resident decedents, where the tax exceeds five hundred dollars, the district judge may allow the public administrator such additional compensation as he may deem just and reasonable.

History: En. Sec. 17, Ch. 65, L. 1923;
amd. Sec. 94, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board."

91-4444. (10400.34) State department of revenue to supervise inheritance tax. It shall be the duty of the state department of revenue to supervise the administration of, and to investigate and cause to be investigated the administration of the inheritance tax laws, and such particular estates to which the inheritance tax laws apply throughout the various counties of the state, and to cause to be made and filed in its office reports of such investigation together with specific information and facts as to particular estates that may seem to require special consideration and attention by the legal department of the state; but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials and persons interested in such estate.

History: En. Sec. 18, Ch. 65, L. 1923;
amd. Sec. 6, Ch. 150, L. 1925; amd. Sec.
95, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" near the beginning of the section.

91-4445. (10400.35) Powers and duties of the department. The state department of revenue in the conduct of inheritance tax affairs, shall have the same and similar powers and authority for gathering information and making investigations as is conferred by law on the department in the performance of its other duties. The department shall biennially report to the governor and to the legislature at the opening of the sessions the general result of its labors and investigations in inheritance tax matters during the previous biennial period, together with specific reports of the several counties where the administration of the inheritance tax laws has been lax and unsatisfactory, with such recommendations for action thereon by the legislature as may be deemed advisable and proper.

History: En. Sec. 18, Ch. 65, L. 1923;
amd. Sec. 6, Ch. 150, L. 1925; amd. Sec.
96, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" throughout the section.

91-4446. (10400.36) Powers and duties in nonresident estates. The state department of revenue shall also gather information and make investigations and reports concerning the estates of nonresident decedents

within the provisions of the inheritance tax laws, and shall especially investigate the probate and other records for such probable estates without the state and report thereon from time to time to the legal department of the state and to the proper district court for appropriate legal action, but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials, and persons interested in such estate.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; amd. Sec. 97, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" near the beginning of the section.

91-4447. (10400.37) Duty of the legal department of state. It shall be the duty of the legal department of the state to carry out and enforce the recommendations and directions of the state department of revenue in all matters pertaining to the conduct of inheritance tax affairs; and in every estate in which the amount of inheritance tax collectible shall exceed or probably exceed the sum of one thousand dollars, there shall be no compounding, composition, or settlement of the taxes under the authority conferred by section 91-4451 or otherwise, until the state department of revenue shall have investigated such estate and made a report thereon, nor until the department consents to such compounding, compromise, or settlement.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; amd. Sec. 98, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board" throughout the section.

91-4448. (10400.38) Forms and blanks. The state department of revenue shall prescribe such forms and prepare such blanks as may be necessary in inheritance tax proceedings in the district courts of the state; and such blanks shall be printed at the expense of the state and furnished to the district court upon the request of the judge or clerk thereof.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; amd. Sec. 99, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" near the beginning of the section.

91-4449. (10400.39) Duties of clerks of district courts. It shall be the duty of the clerk of the district court to furnish to the state department of revenue copies of such documents filed in connection with probate matters as the department may require.

History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; amd. Sec. 100, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board."

91-4450. (10400.40) Monthly reports of county treasurer—payment of collections to state department of revenue—interest on unpaid amounts. On or before the fifth day of each month each county treasurer shall make a report under oath to the state department of revenue listing all payments

received by him under the inheritance tax laws, during the preceding month, and stating for what estate, by whom and when paid. The form of such report shall be prescribed by the state department of revenue. He shall at the same time pay the state department of revenue all the payments received by him under the inheritance tax laws and not previously paid to the state department of revenue, and for all such payments collected by him and not paid to the state department of revenue within five days from the time herein required, he shall pay interest at the rate of ten per cent (10%) per annum.

History: En. Sec. 19, Ch. 65, L. 1923; amd. Sec. 7, Ch. 150, L. 1925; amd. Sec. 2, Ch. 36, L. 1971; amd. Sec. 101, Ch. 391, L. 1973.

Amendments

The 1971 amendment substantially re-wrote this section. For former text, see parent volume.

The 1973 amendment substituted "department of revenue" for "board of equalization" throughout the section.

Effective Dates.

Section 3 of Ch. 36, Laws 1971 read "The change in reporting and remittance of payments received as provided in section 2 is effective for such payments received, or on hand, on or after April 1, 1971. The first report and remittance based on the change is due by May 5, 1971."

Section 4 of Ch. 36, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved February 18, 1971.

91-4451. (10400.41) Composition and compromise. The state department of revenue is authorized to enter into an agreement with the executor, administrator, or trustee of any estate in which remainders or expectant estates have been of such a nature or so disposed and circumstanced that the taxes therein were held not presently payable or where the interests of the legatees or devisees are not ascertainable under the provisions of this act, or whenever a tax is claimed on account of the transfer of any property of a nonresident decedent, and to compound such taxes upon such terms as may be deemed equitable and expedient and to grant discharges to said executors, administrators, or trustees upon the payment of the taxes provided for in such composition, provided, however, that no such composition shall be conclusive in favor of such executors, administrators, or trustees as against the interests of such cestui que trust as may possess either present rights of enjoyment or fixed, absolute, or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto either personally when competent or by guardian. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate and one copy shall be filed in the office of the clerk of the district court of the county in which the tax was paid; one copy to be delivered to the executors, administrators, or trustees, who shall be parties thereto, and one copy to be retained by the department of revenue.

History: En. Sec. 20, Ch. 65, L. 1923; amd. Sec. 102, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" near the beginning and at the end of the section.

91-4454. (10400.45) Employment of assistants by department of revenue—compensation. The state department of revenue may employ such

other persons as experts and assistants as may be necessary to perform the duties that may be required of the department and fix their compensation.

History: En. Sec. 24, Ch. 65, L. 1923; Amendments
amd. Sec. 103, Ch. 391, L. 1973.

The 1973 amendment substituted "department of revenue" and "department" for "board of equalization" and "board."

91-4455. (10400.46) **Hearings by department of revenue—witnesses—false testimony as perjury—compensation.** Oaths of witnesses in any matter under the investigation or consideration of the state department of revenue may be administered by the director of revenue or his appointed agents. In case any witness shall fail to obey any summons to appear before the department or shall refuse to testify or answer any material questions or to produce records, books, papers, or documents, when required to do so, such failure or refusal shall be reported to the attorney general, who shall thereupon institute proceedings in the proper district court to compel obedience to any summons or order of the department or to punish witnesses for any such neglect or refusal. Any person who shall testify falsely in any material manner under the consideration of the department shall be guilty of and punished for perjury. In the discretion of the department, officers who serve summons or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the district court.

History: En. Sec. 25, Ch. 65, L. 1923; ization" and "director of revenue or his
amd. Sec. 104, Ch. 391, L. 1973. appointed agents" for "secretary of the
board or by any member thereof" in the
first sentence; and substituted "depart-
ment" for "board" throughout the remain-
der of the section.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equal-

91-4459. (10400.51) **Checking by county clerk of records and transfers—report to department of revenue.** The county clerk, upon the receipt of the list of deaths provided for in section 91-4458, shall immediately check the records of his county to determine whether any of the deceased persons whose names appear upon such list may have made any transfer of property or of property rights within such county during the three years preceding the death of such person or whether such deceased person may have been possessed of any property in such county at the time of his death.

If he shall find that any such deceased person may have made any such transfers of property or of property rights, or have died possessed of such, he shall immediately transmit such information to the state department of revenue.

History: En. Sec. 3, Ch. 186, L. 1935; Amendments
amd. Sec. 105, Ch. 391, L. 1973.

The 1973 amendment substituted "department of revenue" for "board of equalization" at the end of the section.

91-4460. **County clerk to furnish department of revenue description of property conveyed within three years of death of grantor.** Wherever

any deed conveying real property from husband to wife, or wife to husband, is filed with the county clerk and recorder within three (3) years prior to the date of the death of the grantor, or, at or after the date of death of the grantor, it shall be the duty of the county clerk and recorder to furnish the department of revenue with a description of the property so conveyed and the names of the grantor and the grantee.

History: En. Sec. 1, Ch. 248, L. 1961;
amd. Sec. 106, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "county assessor."

91-4461. Department of revenue to appraise property and certify value. It shall be the duty of the department of revenue or its agent to appraise said property and to certify the appraised value of the property so conveyed on a form to be provided by the state department of revenue for this purpose.

History: En. Sec. 2, Ch. 248, L. 1961;
amd. Sec. 107, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue or its agent" near

the beginning of the section for "county assessor" in order to implement article VIII, section 3 of the 1972 constitution; and substituted "department of revenue" for "board of equalization" near the end of the section.

91-4462. Form provided to grantee—contents. The county clerk and recorder, at the time of the filing of said deed, if the deed is filed at or after death, or when informed by the grantee or someone acting on behalf of the grantee of the death of a grantor within the three (3) year period above mentioned, shall furnish the grantee, or one acting on behalf of the grantee, a form to be prepared by the state department of revenue, which form shall show the degree of relationship between the grantor and the grantee and such other essential information as the state department of revenue may need in order to determine what, if any, inheritance tax may be due to the state of Montana by reason of the transfer of the property so conveyed. Said form shall also contain an affidavit of the grantee setting forth that the grantor died without having any other property necessitating the procuring of letters of administration, or letters testamentary, or special letters for the purpose of terminating joint tenancy and that to the knowledge of the grantee the property was not by will otherwise bequeathed. It shall also contain the name and address of any other heirs of the grantor.

History: En. Sec. 3, Ch. 248, L. 1961;
amd. Sec. 108, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" in two places.

91-4463. Certificate of inheritance tax due. Upon receipt of the report of the agent of the department of revenue, and the form and affidavit of the grantee, the state department of revenue shall issue to the grantee a certificate stating the amount of inheritance tax determined to be due to the state of Montana by reason of said transfer, or if no tax is due, such certificate shall so state.

History: En. Sec. 4, Ch. 248, L. 1961; amd. Sec. 109, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "agent

of the department of revenue" for "county assessor" in order to implement article VIII, section 3 of the 1972 constitution; and substituted "department of revenue" for "board of equalization."

91-4464. Payment by grantee of inheritance tax due—receipts for payment. If a tax is determined due by reason of said transfer the grantee shall pay the tax to the county treasurer, who shall make triplicate receipts of such payment, one of which he shall immediately send to the state treasurer, whose duty it shall be to charge the county treasurer so receiving the tax with the amount thereof. One receipt the county treasurer shall keep on file in his office. The other receipt shall be delivered to the grantee, or one acting in his behalf, which, when filed with the county clerk and recorder together with the certificate of the state department of revenue, shall be prima facie proof of the payment of any inheritance tax due by reason of said transfer. If the certificate shall determine no tax due by reason of said transfer, the filing of said certificate with the county clerk and recorder shall operate to the same effect. Payment of inheritance tax under this act shall be governed by the provisions of section 91-4416.

History: En. Sec. 5, Ch. 248, L. 1961; amd. Sec. 110, Ch. 391, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board of equalization" in the third sentence.

91-4466. Repealed.

Repeal

Section 91-4466 (Sec. 7, Ch. 248, L. 1961), relating to appraisal by state board

of equalization when the county assessor's appraisal is questioned, was repealed by Sec. 113, Ch. 391, Laws 1973.

CHAPTER 45—GUARDIAN AND WARD

91-4515. (5878) Rules of awarding custody of minors.

Death of Both Parents

In a custody dispute between maternal grandparents and father of children whose mother died prior to action, where father to whom children were awarded also died pending hearing on motion for new trial, maternal grandparents who had filed motion for new trial and who had already been determined by court to be fit and proper persons for custody of children would have been entitled to custody without new trial but for second wife of deceased husband who was entitled to hearing on petition to intervene as party to whom deceased father wished children to go. State ex rel. Ross v. District Court, Fourth Judicial Dist., 150 M 233, 433 P 2d 778.

Welfare of Child Paramount

District court did not abuse its discretion in awarding custody of two younger children to father, who had moved to

California, since children had a good home with their father and paternal grandparents, were well cared for and happy, were given more than adequate educational and religious training and had lived with their father for more than five years. Anderson v. Anderson, 145 M 244, 400 P 2d 632.

Although 12-year-old daughter expressed desire to live with her mother, custody was properly awarded to father where evidence showed emotional instability on part of mother which she evinced by communicating her morbid suspicion of improper conduct by father. Libra v. Libra, 157 M 252, 484 P 2d 748.

Evidence that mother had, since time of divorce, remarried, overcome previous emotional difficulties, and quit her job in order to provide for time and attention needed to raise child, supported modification of divorce decree, in best interests of child, so as to grant custody to mother.

McCullough v. McCullough, 159 M 419, 498 P 2d 1189.

References

Hurly v. Hurly, 147 M 118, 411 P 2d 359.

CHAPTER 48—GUARDIANSHIP OF INCOMPETENT VETERANS, MINORS, AND OTHER BENEFICIARIES OF THE VETERANS ADMINISTRATION

Section 91-4812. Compensation of guardians.

91-4801. Definitions.

Compiler's Notes

In addition to those enumerated in the parent volume, the following jurisdictions have adopted the Uniform Veterans'

Guardianship Act: Alabama, Iowa, Kansas, Michigan, Mississippi, Nevada, New York, Puerto Rico, West Virginia and Wyoming.

91-4812. Compensation of guardians. Compensation payable to guardians shall be based upon services rendered and shall not exceed five per cent (5%) of the amount of moneys received during the period covered by the account, or a minimum of one hundred dollars (\$100) whichever is the greater, the decision as to such amount of compensation, however, to be at the discretion of the district court. In the event of extraordinary services by any guardian, the court, upon petition and hearing thereon may authorize reasonable additional compensation therefor. A copy of the petition and notice of hearing thereon shall be given the proper office of the veterans' administration in the manner provided in the case of hearing on a guardian's account or other pleading. No commission or compensation shall be allowed on the moneys or other assets received from a prior guardian nor upon the amount received from liquidation of loans or other investments.

History: En. Sec. 12, Ch. 58, L. 1943; amd. Sec. 1, Ch. 25, L. 1969.

Amendments

The 1969 amendment added "or a minimum of one hundred dollars * * * district court" to the first sentence.

CHAPTER 49—GUARDIAN'S POWERS AND DUTIES

91-4906. (10422) Guardian to return inventory of estate of ward, etc.

Failure To File Inventory

Court on own motion could require guardian to appear and account for funds in his possession, where he neglected to file inventory and appraisal within

three-month period as required by statute, notwithstanding that parties to action were still before court. State ex rel. Ross v. District Court, Fourth Judicial Dist., 150 M 233, 433 P 2d 778.

CHAPTER 50—SALE OF PROPERTY BY GUARDIANS—INVESTMENT OF PROCEEDS

Section 91-5015. Conditions of sales of real estate of wards—bond and mortgage to be given for deferred payments.

91-5015. (10442) Conditions of sales of real estate of wards—bond and mortgage to be given for deferred payments. All sales of real estate of wards, where the sales price is five thousand dollars (\$5,000) or

less, must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from the date of sale, as in the discretion of the court or judge is most beneficial to the ward. For sales of real estate of wards where the sales price exceeds five thousand dollars (\$5,000), deferred payments may be extended not to exceed twenty (20) years. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes and mortgage or trust indenture or contract for deed; on the real estate sold, with such additional security as the court or judge deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon.

History: En. Sec. 390, p. 340, L. 1877; re-en. Sec. 390, 2nd Div. Rev. Stat. 1879; re-en. Sec. 390, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3014, C. Civ. Proc. 1895; re-en. Sec. 7794, Rev. C. 1907; re-en. Sec. 10442, R. C. M. 1921; amd. Sec. 1, Ch. 27, L. 1969. Cal. C. Civ. Proc. Sec. 1791.

Amendments

The 1969 amendment inserted "where the sales price is five thousand dollars (\$5,000) or less" after "real estate of

wards" in the first sentence; inserted the second sentence; and, in the third sentence, deleted "a" before "mortgage" and inserted "or trust indenture or contract for deed" after "mortgage."

Effective Date

Section 2 of Ch. 27, Laws 1969 provided the act should be in effect from and after its passage and approval. Approved February 13, 1969.

CHAPTER 52—GUARDIANSHIP—GENERAL AND MISCELLANEOUS PROVISIONS

91-5201. (10455) Examination of persons suspected of defrauding wards, etc.

Examination of Administrator

In a proceeding for removal of administrator for misappropriation of funds of estate, administrator could be examined as adverse witness as provided in Rule 43, and Rule 81, excluding statutory proceed-

ings from Rules of Civil Procedure to extent that statutory proceedings are contrary to Rules, does not bar examination of administrator as adverse witness. In re Estate & Guardianship of Wyman, 149 M 525, 429 P 2d 629.

CHAPTER 53—PROCEEDINGS IN LIEU OF PROBATE—ESTATES OF LESS THAN TEN THOUSAND DOLLARS

- Section 91-5301. Estate may be set aside to surviving spouse or child—net value of estate must be less than ten thousand dollars.
- 91-5302. Value of joint property and property transferred during lifetime giving rise to tax liability—included in determination of net value of estate.
- 91-5303. Termination of life estate or joint tenancy—combined with proceeding to set aside property.
- 91-5304. Petition to set aside estate—requirements.
- 91-5305. Notice—contents.
- 91-5306. Notice—time and manner of giving.
- 91-5307. Special appraiser—duties, powers and compensation.
- 91-5308. Court decree—conditions—assignment to surviving spouse or child—title vested—subject to encumbrances—exemptions limiting assignment.
- 91-5309. Jurisdiction of court cannot be collaterally attacked when decree final in the absence of fraud.
- 91-5310. When estate shall be administered in the usual manner.
- 91-5311. Pending actions excepted.
- 91-5312. Existing statutes not repealed.

91-5301. Estate may be set aside to surviving spouse or child—net value of estate must be less than ten thousand dollars. If a decedent leaves a surviving spouse or child or children, and the net value of the whole estate, over and above all liens and encumbrances at the date of death and over and above the value of any homestead interest set apart out of decedent's estate under chapter 25, Title 91, R. C. M. 1947, does not exceed the sum of ten thousand dollars (\$10,000), the same may be set aside to the surviving spouse, if there be one, and if there be none, then to the child or children of the decedent.

History: En. Sec. 1, Ch. 51, L. 1969;
amd. Sec. 1, Ch. 223, L. 1973.

Title of Act

An act to provide for summary proceedings in lieu of probate for specified estates of less than ten thousand dollars.

Amendment

The 1973 amendment deleted "resident" before "decedent" near the beginning of the section; and deleted "minor" before "child" and "children."

91-5302. Value of joint property and property transferred during lifetime giving rise to tax liability—included in determination of net value of estate. The value of decedent's interest in any joint property at the time of his death, which might give rise to tax liability under section 91-4405, R. C. M. 1947, and the value of any property transferred by the decedent during his lifetime which might give rise to tax liability under section 91-4402, R. C. M. 1947, shall be included to determine if the net value of the whole estate of the decedent does exceed the sum of ten thousand dollars (\$10,000) as provided in the preceding section.

History: En. Sec. 2, Ch. 51, L. 1969.

91-5303. Termination of life estate or joint tenancy—combined with proceeding to set aside property. An action or proceedings to terminate a life estate or joint tenancy may be combined with an action or proceedings to set aside property under this act, where otherwise proper under the provisions of this act, and of section 91-4321, R. C. M. 1947.

History: En. Sec. 3, Ch. 51, L. 1969.

91-5304. Petition to set aside estate—requirements. Allegations showing that this act is applicable together with a prayer that the estate be set aside as provided in this act may be included alternately in the petition for probate of the will, or for letters of administration; or such allegations and prayer may be presented by separate petition filed by the personal representative of the decedent, or the surviving spouse, or the child or children, filed at any time before the hearing on the petition for the probate of the will or for letters of administration or after the filing of the inventory. In all cases the petition must be verified; and the allegation shall include a specific description and an estimate of the value of all of the decedent's property, a list of all liens and encumbrances at the date of death, and a designation of any property as to which a homestead is or may be set aside.

History: En. Sec. 4, Ch. 51, L. 1969;
amd. Sec. 2, Ch. 223, L. 1973.

Amendments

The 1973 amendment deleted "guardian of the minor" preceding "child or children" in the first sentence.

91-5305. Notice—contents. If the allegations and prayer as provided in the preceding section are included in the petition for probate of the will or for letters of administration, the notice of hearing shall include a statement that a prayer for setting aside the estate to the surviving spouse or the child or children as the case may be, is included in the petition.

History: En. Sec. 5, Ch. 51, L. 1969; **Amendments**
amd. Sec. 3, Ch. 223, L. 1973.

The 1973 amendment deleted "minor" before "child" and "children."

91-5306. Notice—time and manner of giving. If a separate petition is filed under the provisions of this act, notice thereof shall be given in the manner and for the time required for a petition for letters of administration. If a separate petition for probate of the will of the decedent, as for letters of administration of his estate, be filed, such petitions shall be heard at the same time as a petition under this act, and for that purpose the court may continue the hearing on any such petition, so that at least ten (10) days notice is given for each such petition pending before the court.

History: En. Sec. 6, Ch. 51, L. 1969.

91-5307. Special appraiser—duties, powers and compensation. Upon the filing of any petition provided for in this act, unless the whole estate consists of money, the court shall forthwith appoint a special appraiser as provided in section 91-4427, R. C. M. 1947, who shall have the duty, powers and compensation provided by law with respect to the property described in such petition.

History: En. Sec. 7, Ch. 51, L. 1969.

91-5308. Court decree—conditions—assignment to surviving spouse or child—title vested—subject to encumbrances—exemptions limiting assignment. If upon the hearing of any petition provided for by this act, the court finds that the net value of the estate of the decedent, determined as provided in this act, does not exceed the sum of ten thousand dollars (\$10,000), as of the date of death of the decedent, and that the expenses of the last illness, funeral and burial charges and expenses of administration and all other creditors have been paid, it shall, by decree for that purpose, assign such estate to the surviving spouse; if there be no such surviving spouse, at the time of such decree, then to the child or children of the decedent; all subject to whatever mortgages, liens or encumbrances upon such estate there may be at the time of the death of the decedent. The title to such estate so assigned or set aside shall vest absolutely in the person or persons named in the decree, subject to mortgages, liens or encumbrances as here provided, and there must be no further proceedings in the administration, unless further estate be discovered. But no surviving spouse or child shall be entitled to such an assignment where the net value of the whole estate transferring to them from the decedent including the value of decedent's interest in any joint property owned by the decedent at the time of his death, and the value of any property

transferred by the decedent in contemplation of decedent's death, exceeds, as to such spouse, or such child, respectively, the exemptions provided for them in section 91-4414, R. C. M. 1947.

History: En. Sec. 8, Ch. 51, L. 1969; amd. Sec. 4, Ch. 223, L. 1973.

Amendments

The 1973 amendment substituted "the child or children of the decedent" for

"such child or children as may then be minors" in the next to last clause in the first sentence; and deleted "minor" preceding "child" in two places in the third sentence.

91-5309. Jurisdiction of court cannot be collaterally attacked when decree final in the absence of fraud. In the absence of fraud in the procurement, a decree assigning an estate pursuant to the provisions of this act, when it becomes final, is a conclusive determination of the jurisdiction of the court, except when based upon an erroneous assumption of death, and cannot be collaterally attacked.

History: En. Sec. 9, Ch. 51, L. 1969.

91-5310. When estate shall be administered in the usual manner. If the court finds that the net value of the estate determined as provided in this act exceeds the sum of ten thousand dollars (\$10,000) or that the surviving spouse, or child or children, are not entitled to an assignment under this act, or that there is neither a surviving spouse or surviving child of the decedent, the petition to set aside property of the decedent shall be denied, and the estate shall be then administered in the usual manner.

History: En. Sec. 10, Ch. 51, L. 1969; amd. Sec. 5, Ch. 223, L. 1973.

Amendments

The 1973 amendment deleted "minor" before "child" and "children" throughout the section.

91-5311. Pending actions excepted. This act shall not apply to estates of decedents filed or pending in any court prior to the effective date of this act.

History: En. Sec. 11, Ch. 51, L. 1969.

Compiler's Notes

This act became effective July 1, 1969.

91-5312. Existing statutes not repealed. This act shall not be construed to repeal any other existing statutes relating to probate proceedings.

History: En. Sec. 12, Ch. 51, L. 1969.

TITLE 92—WORKMEN'S COMPENSATION ACT

- Chapter 1. Industrial accident board—creation and powers, 92-101, 92-104, 92-111, 92-116.1, 92-118, 92-121.
2. Defenses—election to come under act, 92-202.1, 92-204.1, 92-206, 92-207.1, 92-208, 92-209.
3. Hazardous occupations to which act applies, Repealed—Section 6, Chapter 443, Laws of 1973.
4. Meaning of words employed in act, 92-410.1, 92-411, 92-413, 92-417, 92-418, 92-418.1, 92-423.1, 92-423.2, 92-425, 92-438.1, 92-439 to 92-441.
6. Claims—liability for injury under different plans of act, 92-601, 92-614 to 92-616.
7. Compensation for various injuries—amount—payment, 92-701.1, 92-702.1, 92-703.1, 92-704.1, 92-704.2, 92-705, 92-706.1 to 92-710.
8. Miscellaneous regulations—powers of board—rehearings and appeals, 92-827, 92-834.
9. Compensation plan No. 1, 92-901, 92-902.
10. Compensation plan No. 2, 92-1004, 92-1005.
11. Compensation plan No. 3, 92-1101 to 92-1105.1, 92-1108, 92-1121.
12. Safety provisions, Repealed—Sections 6 to 8, Chapter 176, Laws of 1957; Section 30, Chapter 341, Laws of 1969.
13. Occupational Disease Act, 92-1303 to 92-1305, 92-1310 to 92-1313, 92-1315, 92-1315.1, 92-1321, 92-1334.
14. Rehabilitation of injured workmen, 92-1403.

CHAPTER 1—INDUSTRIAL ACCIDENT BOARD— CREATION AND POWERS

- Section 92-101. Name of act—what each part to contain.
- 92-104. Industrial accident board—compensation—terms and salaries.
- 92-111. Office and furnishings—quarters.
- 92-116.1. Administration fund.
- 92-118. Reports and bulletins which may be published.
- 92-121. Merit system.

92-101. (2816) Name of act—what each part to contain. This act shall be known and may be cited as the Workmen's Compensation Act. Part I (sections 92-101 to 92-843) shall contain those sections which have a general application to the whole of the act, and may be referred to as the "general provisions"; part II (sections 92-901 to 92-908) shall contain those sections which refer to compensation plan number one; part III (sections 92-1001 to 92-1012) shall contain those sections which refer to compensation plan number two; part IV (sections 92-1101 to 92-1123) shall contain those sections which refer to compensation plan number three.

History: En. Sec. 1, Ch. 96, L. 1915; re-en. Sec. 2816, R. C. M. 1921; amd. Sec. 29, Ch. 341, L. 1969.

Amendments

The 1969 amendment deleted "part V (sections 92-1201 to 92-1222) shall contain those sections which may be referred to as the 'safety provisions'" from the end of the section.

Repealing Clause

Section 30 of Ch. 341, Laws 1969 read "Sections 41-1701 through 41-1707, 92-1201 through 92-1210 and 92-1214 through 92-1222, R. C. M. 1947, are repealed."

References

Benoit v. Murphy Corp., 143 M 463, 391 P 2d 350.

92-104. (2819) Industrial accident board—compensation—terms and salaries. There is hereby created a board to consist of three (3) members. The commissioner of labor and industry shall be one (1) member, the director of the bureau of vocational rehabilitation shall be one (1) member, and one (1) member shall be appointed by the governor, by and with the consent of the senate. The board shall be known as the industrial accident board and shall have the powers, duties, and functions hereinafter conferred. The term of office of the appointed member of the board shall be four (4) years and until his successor shall have been appointed and confirmed. He shall receive an annual salary in such amount as may be specified by the legislative assembly in the appropriation to the industrial accident board, payable monthly and shall be chairman of the board. If the legislative assembly does not specify the maximum salary for the chairman of the board, it shall be fixed by the board after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. The board shall elect one (1) of their own number as treasurer of the board.

History: En. Sec. 2, Ch. 96, L. 1915; amd. Sec. 1, Ch. 95, L. 1919; amd. Sec. 1, Ch. 254, L. 1921; re-en. Sec. 2819, R. C. M. 1921; amd. Sec. 1, Ch. 161, L. 1953; amd. Sec. 1, Ch. 231, L. 1959; amd. Sec. 1, Ch. 148, L. 1961; amd. Sec. 9, Ch. 225, L. 1963; amd. Sec. 15, Ch. 237, L. 1967.

Amendments

The 1967 amendment substituted "in

such amount * * * to the industrial accident board" for "of not more than ten thousand dollars (\$10,000)" in the fifth sentence; and inserted the sixth and seventh sentences.

Cross-References

Board abolished and functions transferred, sec. 82A-1005(1).

92-106, 92-107. (2821, 2822) Repealed.

Repeal

These sections (Sec. 2, Ch. 96, L. 1915; Sec. 1, Ch. 81, L. 1941; Sec. 1, Ch. 235, L. 1947), relating to bonds of member and employees of the industrial accident com-

mission, were repealed by Sec. 51, Ch. 177, Laws 1965. For new provisions relating to bonds for state officers and employees, see sec. 6-105 et seq.

92-111. (2826) Office and furnishings—quarters. The board shall keep its principal office in the capital of the state. It may rent or lease quarters for the conduct of its administrative duties.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2826, R. C. M. 1921; amd. Sec. 1, Ch. 234, L. 1969.

Amendments

The 1969 amendment deleted "and shall be provided with suitable rooms,

necessary office furniture, stationery, and other supplies" from the end of the first sentence and substituted the present second sentence for one reading, "For the purpose of holding sessions in other places the board shall have power to rent temporary quarters."

92-116. (2831) Repealed.

Repeal

Section 92-116 (Sec. 2, Ch. 96, L. 1915; Sec. 1, Ch. 176, L. 1957; Sec. 164, Ch. 147, L. 1963), relating to deposit of fees, fines

and assessments and their application to administrative expenses, was repealed by Sec. 2, Ch. 253, Laws 1973. For new law, see sec. 92-116.1.

92-116.1. Administration fund. There is hereby established in the state treasury a workmen's compensation administration fund out of which all costs of administering the Workmen's Compensation and Occupational Disease and Occupational Safety and Health Act are to be paid upon lawful appropriation. The following moneys collected by the workmen's compensation division shall be deposited in the state treasury to the credit of the **workmen's** compensation administrative fund and shall be used for the administrative expenses of the division:

(1) all fees and fines provided in sections 92-119, 92-820, 92-1334 and 92-1358;

(2) all assessments paid to the division by employers who elect to become bound by plan no. 1 of this act;

(3) all assessments paid to the division of insurers who insure employers under plan no. 2 of this act;

(4) all fees paid for inspection of boilers and issuance of licenses to operating engineers as required by law;

(5) all assessments levied against the industrial insurance account in the division fund as provided by this act.

The administration fund shall be debited with expenses incurred by the division in the general administration of the provisions of this act, including the salaries of its members, officers and employees, and the actual and necessary traveling expenses and disbursements of such members, officers and employees, incurred while on the business of the division either within or without the state.

Disbursements from the administration moneys shall be made after being approved by the division upon claim therefor.

The division shall levy against the industrial insurance account in the division fund an assessment in an amount deemed reasonable and necessary to provide adequate administrative funds for the administration of the various acts. The assessment is to be levied against the gross annual direct premium income for the previous fiscal year, less return premiums, and said assessment shall be paid forthwith by the treasurer into the administration moneys in the earmarked revenue fund.

History: En. 92-116.1 by Sec. 1, Ch. 253, L. 1973.

Title of Act

An act providing for amendatory language to an existing funding procedure provided in a new section; and repealing section 92-116, R. C. M. 1947.

Repealing Clause

Section 2 of Ch. 253, Laws 1973 read "Section 92-116, R. C. M. 1947, is repealed."

92-118. (2833) Reports and bulletins which may be published. The board shall have the power and authority to publish and distribute at its discretion from time to time, in addition to its report required by section 2 [82-4002] of this act, such further reports and bulletins covering its operations, proceedings, and matters relative to its work as it may deem advisable.

History: En. Sec. 2, Ch. 96, L. 1915;
re-en. Sec. 2833, R. C. M. 1921; amd. Sec.
41, Ch. 93, L. 1969.

Amendments

The 1969 amendment substituted the reference to the reporting requirements of section 82-4002 for former reference to annual reports.

92-121. Merit system. Employees of the division, except the administrator, are included within the joint merit system if such inclusion is required for the receipt of federal funds by 29 CFR 1902.3 (h), or by any other federal law or regulation.

History: En. 92-121 by Sec. 1, Ch. 332,
L. 1973.

Title of Act

An act providing for inclusion of certain employees of the division of workmen's compensation within the joint merit system.

CHAPTER 2—DEFENSES—ELECTION TO COME UNDER ACT

Section 92-202.1. Employments exempted from coverage.

92-204.1. Election of employer and employee to come under act—action against third party causing injury—right to subrogation.

92-206. Compensation plan No. 3 exclusive, etc., when a public corporation is the employer.

92-207.1. Employments covered.

92-208. Employees bound by act—election.

92-209. Employer shall make election before being bound—employee presumed to have elected.

92-201. (2836) Defenses excluded in personal injury action, etc.

Application to Employers Not Electing

Custom combining was a hazardous business operation as described by former section 92-301 and employer so engaged was required to carry workmen's compensation, in absence of which coverage

the employer lost all common-law defenses as provided by this section. *State ex rel. Romero v. District Court, Eighth Judicial Dist., Cascade County, — M —, 513 P 2d 265.*

92-202. (2837) Repealed.

Repeal

Section 92-202 (Sec. 3, Ch. 96, L. 1915; Sec. 1, Ch. 121, L. 1925), relating to cer-

tain employers for whom defenses are not excluded in personal injury actions, was repealed by Sec. 2, Ch. 492, Laws 1973.

92-202.1. Employments exempted from coverage. This act shall not apply to any of the following employments unless the employer elects coverage under this act:

(1) Household employment.

(2) Casual employment.

(3) Employment of members of an employer's family dwelling in his household.

(4) Employment of sole proprietors or working members of a partnership.

(5) Employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States.

(6) Any person performing services in return for aid or sustenance only.

History: En. 92-202.1 by Sec. 1, Ch. 492, L. 1973.

Repealing Clause

Section 2 of Ch. 492, Laws 1973 read "Section 92-202, R. C. M. 1947, is repealed."

Title of Act

An act providing for exempted employments from coverage under the Workmen's Compensation Act; and repealing section 92-202, R. C. M. 1947.

DECISIONS UNDER FORMER LAW

Agricultural Employment

Custom combiner who hired out his services to farmers and harvested crops he did not raise or own was not engaged in agricultural employment and was not exempt from workmen's compensation laws. State ex rel. Romero v. District Court, Eighth Judicial Dist., Cascade County, — M —, 513 P 2d 265.

Equal Protection

Exclusion of employers engaged in farming and stock raising from the requirements of this act by former section 92-202 was a legitimate classification by the legislature and not in conflict with United States Constitution Fourteenth Amendment. State ex rel. Hammond v. Hager, — M —, 503 P 2d 52, appeal dismissed 411 US 912, 36 L Ed 2d 303, 93 S Ct 1548.

92-204. (2839) Repealed.

Repeal

Section 92-204 (Sec. 3, Ch. 96, L. 1915; Sec. 1, Ch. 138, L. 1933; Sec. 1, Ch. 230, L. 1943; Sec. 2, Ch. 235, L. 1947; Sec. 1, Ch. 270, L. 1969), relating to elective

coverage, to exclusion of other remedies, to remedies in tort against third parties, and to subrogation, was repealed by Sec. 2, Ch. 493, Laws 1973. For new law, see sec. 92-204.1.

92-204.1. Election of employer and employee to come under act—action against third party causing injury—right to subrogation. Where both the employer and employee have elected to come under this act, the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and the servants, and employees of such employer and such employee, as among themselves, of their right to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for or on account of any personal injury to or death of such employee, except as such rights may be hereinafter specifically granted; and such election shall bind the employee himself, and in case of death shall bind his personal representative, and all persons having any right or claim to compensation for his injury or death, as well as the employer, and the servants and employees of such employer, and those conducting his business during liquidation, bankruptcy or insolvency. The right to compensation and medical benefits as provided by this act shall not be affected by the fact that the injury, occupational disease or death is caused by the negligence of a third party other than the employer, or the servants or employees of the employer. Whenever such event shall occur to an employee while performing the duties of his employment and such event shall be caused by the act or omission of some persons or corporations other than his employer, or the servants or employees of his employer, then such employee, or in case of his death his heirs or personal representative shall, in addition to the right to re-

ceive compensation under this act, have a right to prosecute any cause of action he may have for damages against such persons or corporations. Further provided, that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the intentional and malicious act or omission of a servant or employee of his employer, then such employee, or in case of his death, his heirs or personal representatives, shall, in addition to the right to receive compensation under the Workmen's Compensation Act, have a right to prosecute any cause of action he may have for damages against such servants or employees of his employer, causing such injury. Provided, that the employer or insurer shall be entitled to full subrogation for all compensation and benefits paid or to be paid under this act, except as otherwise provided in this section. The employer's or insurer's right of subrogation shall be a first lien on such claim, judgment or recovery. The employee shall institute such third party action after giving the employer or insurer reasonable notice of his intention to institute such third party action. The employee may request that such insurer pay a proportionate share of the reasonable cost, including attorneys' fees, of such third party action. The insurer may elect not to participate in the cost of the third party action, but as such election is made the insurer shall be deemed to have waived fifty per cent (50%) of its subrogation rights granted by the section. Provided, however, that if an employee refuses or fails to institute such action within one (1) year from the date of injury, the employer or insurer may institute such third party action in his name and for his benefit or that of his personal representative. If the employee or his personal representative institutes such third party action, he shall be entitled to at least one-third (1/3) of the amount recovered by judgment or compromise settlement less his proportionate share of the reasonable costs, including attorneys' fees, in the event the amount of recovery is insufficient to provide him with that amount after payment of subrogation. In the event the employer or insurer institutes such third party action, he shall pay to the employee any amount recovered by judgment or settlement which is in excess of the amounts paid or to be paid under this act an employer's or insurer's reasonable costs and attorneys' fees. Nothing contained in this section shall prevent the employer or insurer, including the division of workmen's compensation, from entering into compromise agreements in settlement of subrogation rights. If death results from the injury or occupational disease, the employer shall have a right of action against the third party for recovery of any amount paid under this act, and such right of action shall be in addition to any cause of action by the heirs or personal representative of the deceased. In the event that the amount of compensation and benefits payable under this act shall not have been fully determined at the time such employee or his heirs or personal representative, or the employer or insurer, shall receive settlement of his action, prosecuted as aforesaid, then the division shall determine what proportion of such settlement shall be allocated under subrogation and such determination may be appealed as any other determination of the division.

History: En. 92-204.1 by Sec. 1, Ch. 493, L. 1973.

Title of Act

An act providing for election of employers and employees to come under the Workmen's Compensation Act; providing for actions against third party causing

injury; providing for a right to subrogation; and repealing section 92-204, R. C. M. 1947.

Repealing Clause

Section 2 of Ch. 493, Laws 1973 read "Section 92-204, R. C. M. 1947, is repealed."

DECISIONS UNDER FORMER LAW

Exclusive Remedy

Where employee was injured while performing work assigned to him under contract between his employer and second company, failure of second company to file timely injury report with industrial accident board prevented it from invoking exclusive jurisdiction in board as "exclusive remedy" after employee filed civil suit in district court. *State ex rel. Broesder v. Industrial Accident Board*, 154 M 178, 461 P 2d 456.

Injured employee receiving workmen's compensation benefits was barred from seeking damages for same injuries in negligence action against coemployee. *Madison v. Pierce*, 156 M 209, 478 P 2d 860.

Employee who had received workmen's compensation benefits for personal injury was precluded from maintaining action against owner of 98% of corporate stock on theory he was co-employee, since act granted immunity to co-employees. *Baird v. Remoir*, 156 M 348, 480 P 2d 186.

Where electric company's independent contractor was specifically required to carry workmen's compensation insurance, an employee of the contractor could not bring an action in tort against the electric company for injuries he suffered when a pole broke. *Buerkle v. Montana Power Co.*, 157 M 57, 482 P 2d 564.

Employer's immunity from common-law liability remains even when there have been wanton, willful and intentional violations of safety statutes, and the immunity is abrogated only if the injury itself was intentionally inflicted. *Enberg v. Anaconda Co.*, 158 M 135, 489 P 2d 1036.

Employee, having elected to be bound by workmen's compensation law, and being compensated thereunder, was not entitled to maintain an action against employer for negligence, notwithstanding contention that employer's actions were willful and therefore not within statute barring employee's action against employer for common-law negligence; employee was not third-party beneficiary of safety clauses in contract between employer and United States and could not maintain action against employer for common-law negligence in absence of express promise in contract between employer

and United States to pay damages to employee for employer's negligence. *Hensley v. United States*, 279 F Supp 548.

Where independent contractor defense is not applicable to general employer, general employer is substituted for immediate employer and is liable for injury under Workmen's Compensation Act and claimant cannot maintain common-law personal injury action against general employer. *Campbell v. Shell Oil Co.*, 329 F Supp 846.

General Contractor's Liability

Bank which required independent contractor to provide workmen's compensation coverage against the claims of employees of a subcontractor was immune from suit by employee of subcontractor to recover damages suffered, allegedly due to bank's negligence. *State ex rel. First Nat. Bank & Trust Co. v. District Court*, — M —, 505 P 2d 408.

Joint Venture As Employer

Individual members of joint venture are "employers" within act and as such are immune from tort actions for death of employees of joint venture. *Hamman v. United States*, 267 F Supp 420.

Right To Sue Third Party

Provision in this section for exclusive remedy under this act does not preclude a defendant who is liable at common law to employee from seeking indemnity from plaintiff's employer as third-party defendant on an indemnity agreement. *DeShaw v. Johnson*, 155 M 355, 472 P 2d 298.

Plaintiff, who received workmen's compensation benefits for injuries sustained while in the employ of independent contractor, was denied claim against the landowners since they exercised no control over work area. *Baird v. Chokatos*, 156 M 32, 473 P 2d 547.

The amount of injured workman's recovery from uninsured motorist coverage cannot be reduced by any workmen's compensation benefits received by him; insurance commissioner had no authority to approve a policy providing for such reduction. *Sullivan v. Doe*, 159 M 50, 495 P 2d 193.

Employee of joint venture was entitled to sue engineering firm in relation of

independent contractor as to joint venture for engineering firm's negligence causing injury to employee under that portion of statute (prior to 1969 amendment) giving right of action against third parties when injuries are caused by act of some person other than employer. *Hamman v. United States*, 267 F Supp 420.

Subrogation to Wrongful Death Settlement

Subrogation rights of employer's in-

surer extended to wrongful death benefits recovered from third-party tort-feasor by workman's surviving kin. *Fisher v. Missoula White Pine Sash Co.*, — M —, 518 P 2d 795, holding that statement in *Hardware Mutual Cas. Co. v. Butler*, 116 M 73, 148 P 2d 563 that subrogation rights of employer and insurer against third-party tort-feasor may exist independently of the Workmen's Compensation Act was dictum and should be disregarded.

92-206. (2840) Compensation plan No. 3 exclusive, etc., when a public corporation is the employer. Where a public corporation is the employer, the terms, conditions, and provisions of compensation plan No. 3 shall be exclusive, compulsory, and obligatory upon both employer and employee. Any sums necessary to be paid under the provisions of this act by any public corporation shall be considered to be ordinary and necessary expense of such corporation, and the governing body of such public corporation shall make appropriation of and pay such sums, into the accident or administration fund, as the case may be, at the time and in the manner provided for in this act, notwithstanding that such governing body may have failed to anticipate such ordinary and necessary expense in any budget, estimate of expenses, appropriations, ordinances, or otherwise. Whenever a contractor is engaged as an employer in the performance of contract work for a public corporation, such employer must elect to be bound by the terms, conditions and provisions of either compensation plan No. 2 or compensation plan No. 3, and the terms, conditions and provisions of the plan chosen shall be compulsory and obligatory upon both employer and employee. Whenever any public corporation neglects or refuses to file with the industrial accident board monthly payroll report of its employees, the board is hereby authorized and empowered to levy an arbitrary assessment upon such public corporation in an amount of twenty-five dollars for each such assessment, which assessments shall be collected in the manner provided in this act for the collection of assessments.

History: En. Sec. 3, Ch. 96, L. 1915; amd. Sec. 1, Ch. 100, L. 1919; amd. Sec. 1, Ch. 196, L. 1921; re-en. Sec. 2840, R. C. M. 1921; amd. Sec. 1, Ch. 410, L. 1971.

Amendments

The 1971 amendment deleted "or any

contractor engaged in the performance of contract work for such public corporation" after "is the employer" in the first sentence; and completely rewrote the third sentence.

92-207. (2841) Repealed.

Repeal

Section 92-207 (Sec. 3, Ch. 96, L. 1915; Sec. 1, Ch. 119, L. 1939; Sec. 1, Ch. 135, L. 1941; Sec. 3, Ch. 235, L. 1947), relating

to coverage of employers in hazardous industries, was repealed by Sec. 2, Ch. 282, Laws 1973.

92-207.1. Employments covered. This act applies to all public employment and to all private employment not expressly exempted by section 92-202.1. If any employer shall fail to make said election, in the time and

in the manner herein prescribed, he shall be guilty of a misdemeanor, and punishable by a fine of not less than one hundred dollars (\$100) nor more than six hundred dollars (\$600) or imprisonment in the county jail for a period not to exceed six (6) months or by both such fine and imprisonment. A failure to provide compensation for each employee shall be deemed a separate offense for the purposes of this act.

History: En. 92-207.1 by Sec. 1, Ch. 282, L. 1973.

inal penalties; and repealing section 92-207, R. C. M. 1947.

Title of Act

An act providing for the nonexempted employments covered by the Workmen's Compensation Act; and providing crim-

Repealing Clause

Section 2 of Ch. 282, Laws 1973 read "Section 92-207, R. C. M. 1947, is repealed."

DECISIONS UNDER FORMER LAW

Hazardous Occupations

Custom combining was a hazardous business operation within meaning of former section 92-301, and as such the employer was required to carry workmen's compensation insurance, in the absence of

which coverage the employer lost all common-law defenses as provided by section 92-201. State ex rel. Romero v. District Court, Eighth Judicial Dist., Cascade County, — M —, 513 P 2d 265.

92-208. (2842) Employees bound by act—election. Every employee whose employer is bound by the provisions of this act shall become subject to and be bound by the provisions of that plan of compensation which shall have been adopted by his employer except that pursuant to such rules and regulations as the division shall from time to time promulgate, and subject in all cases to the review of the division, officers of private corporations may elect not to be bound as employees under the act by a written notice in the form provided by the division, served in the following manner:

(1) If the employer has elected to be bound by the provisions of compensation plan No. 1, by delivering said notice to the board of directors of the employer.

(2) If the employer has elected to be bound by the provisions of compensation plan No. 2, by delivering said notice to the board of directors of the employer or the insurer.

(3) If the employer has elected to be bound or is bound by the provisions of compensation plan No. 3, by delivering said notice to the division of workmen's compensation.

(4) The appointment or election of an officer of a corporation for the purpose of excluding an employee from coverage under the act shall not entitle such officer to elect not to be bound as an employee under the act.

In any case, the notice shall be signed by the officer under oath or equivalent affirmation and is subject to the penalties for false swearing.

(5) The division shall review any officers of private corporation's election not to be bound as an employee to assure compliance with this act.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2842, R. C. M. 1921; amd. Sec. 1, Ch. 95, L. 1963; amd. Sec. 1, Ch. 145, L. 1971; amd. Sec. 1, Ch. 95, L. 1974.

Amendments

The 1971 amendment inserted "that pursuant to such rules and regulations as the board shall from time to time promul-

gate, and subject in all cases to the approval of the board" in the preliminary paragraph.

The 1974 amendment substituted "division" for "board" in the preliminary paragraph; substituted "review of the division" for "approval of the board" in

the preliminary paragraph; substituted "division of workmen's compensation" for "industrial accident board" at the end of subdivision (3); added subdivisions (4) and (5); and made minor changes in punctuation and style.

92-209. (2844) Employer shall make election before being bound—employee presumed to have elected. It is the intention of this act that any employer engaged in employments covered herein shall, before being bound by any of the compensation plans herein provided, elect to be so bound thereby, and that the employee shall be presumed to have elected to be subject to and bound by the provisions of the particular plan which may have been adopted by his employer, unless such employee shall affirmatively elect not to be bound by this act, as provided in section 92-208. Provided, that an employer, after having been bound by one or the other of the three plans, may be canceled as an employer under the act, when such employer actually ceases operating and files a signed statement to that effect with the division. Upon such filing the division shall return the deposit of said employer if all premiums are paid.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2844, R. C. M. 1921; amd. Sec. 4, Ch. 235, L. 1947; amd. Sec. 2, Ch. 95, L. 1963; amd. Sec. 1, Ch. 443, L. 1973.

Amendments

The 1973 amendment substituted "em-

ployments covered herein" for "hazardous occupations as defined herein" near the beginning of the first sentence; substituted "division" for "board" in two places; substituted "shall return" for "may return" in the final sentence; and made a minor change in phraseology.

92-211. (2846) Act applies to all inherently hazardous occupations, etc.

References

Simons v. Fisher, 146 M 526, 409 P 2d 449.

CHAPTER 3—HAZARDOUS OCCUPATIONS TO WHICH ACT APPLIES

(Repealed—Section 6, Chapter 443, Laws of 1973)

92-301 to 92-306. (2847 to 2852) Repealed.

Repeal

Sections 92-301 to 92-306 (Secs. 4, 5, Ch. 96, L. 1915; Sec. 2, Ch. 100, L. 1919; Sec. 1, Ch. 117, L. 1925; Secs. 1, 2, Ch. 88, L. 1945), defining the hazardous oc-

cupations covered by workmen's compensation, were repealed by Sec. 6, Ch. 443, Laws 1973. For new law, see sec. 92-207.1.

CHAPTER 4—MEANING OF WORDS EMPLOYED IN ACT

Section 92-410.1. Employer defined.

92-411. Employee and workman defined.

92-413. Beneficiary defined.

92-417. Child defined, to include whom.

92-418. Injury or injured defined.

92-418.1. Heart and lung disease of others not excluded by provision relating to firemen.

92-423.1. Wages defined.

92-423.2. Average weekly wage defined.

92-425. Husband or widower defined.

- 92-438.1. Independent contractor defined.
 92-439. Temporary total disability defined.
 92-440. Permanent partial disability defined.
 92-441. Permanent total disability defined.

92-402 to 92-407. (2854 to 2859) Repealed.

Repeal

Sections 92-402 to 92-407 (Sec. 6, Ch. 96, L. 1915), defining various types of

"hazardous employment," were repealed by Sec. 6, Ch. 443, Laws 1973.

92-410. (2862) Repealed.

Repeal

Section 92-410 (Sec. 6, Ch. 96, L. 1915; Sec. 2, Ch. 121, L. 1925; Sec. 1, Ch. 50,

L. 1965), defining "employer," was repealed by Sec. 2, Ch. 154, Laws 1973. For new law, see sec. 92-410.1.

92-410.1. Employer defined. "Employer" means the state and each county, city and county, city school district, irrigation district, all other districts established by law and all public corporations and quasi-public corporations and public agencies therein and every person, every prime contractor, and every firm, voluntary association and private corporation, including any public service corporation and including an independent contractor who has any person in service under any appointment or contract of hire, expressed or implied, oral or written, and the legal representative of any deceased employer or the receiver or trustee thereof.

Any employer who contracts to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation or profession of such employer shall be liable for the payment of compensation to the employees of any subcontractor unless the subcontractor primarily liable for the payment of such compensation has coverage under this act. Any employers who shall become liable for such compensation may recover the amount of benefits paid and necessary expenses from the subcontractor primarily liable therein.

History: En. 92-410.1 by Sec. 1, Ch. 154, L. 1973.

92, R. C. M. 1947; and repealing section 92-410, R. C. M. 1947.

Title of Act

An act providing for a definition of "employer" and providing comprehensive coverage extending to subcontractors in the Workmen's Compensation Act, title

Repealing Clause

Section 2 of Ch. 154, Laws 1973 read "Section 92-410, R. C. M. 1947, is repealed."

DECISIONS UNDER FORMER LAW

Joint Ventures

Individual members of joint venture are "employers" within meaning of act and as such are immune from tort actions for death of employees of joint venture. *Hamman v. United States*, 267 F Supp 420.

Transfer of Company Operation

Where milling company transferred its trucking facilities to a different location where they were operated on a break-even basis under supervision of assistant to the

president of the company in order to avoid inclusion of truck drivers in union bargaining unit with rest of its employees, truck driver's employment had not been transferred so as to entitle him to bring common-law negligence action against the trucking operation as a separate employer since control remained in the company which supervised activities of its presidential assistant. *State ex rel. Ferguson v. District Court, Eighteenth Judicial Dist., Gallatin County*, — M —, 519 P 2d 151.

92-411. (2863) Employee and workman defined. "Employee" and "workman" are used synonymously and mean every person in this state, including a contractor other than an "independent contractor" who is in the service of an employer as defined by the preceding section, under any appointment or contract of hire, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay, including city and town firemen, highway patrolmen, police officers, county sheriffs, deputy sheriffs, constables, truant officers and all peace officers, also all public officers and their deputies, assistants and employees, but excluding any person whose employment is both casual and not in the courses of the trade, business, profession or occupation of his employer, unless such employer has elected to be bound by the provisions of the compensation law, in which case all employees are included, whether their employment is casual or otherwise, and also excluding any employee engaged in household or domestic service.

"Employee" also means a recipient of general relief who is performing work for a county of this state under the provisions of section 71-307, any juvenile performing work under authorization of a district court judge in a delinquency prevention or rehabilitation program, and any person receiving vocational rehabilitation training, or other on-the-job training under any state or federal vocational training program, whether or not under any appointment or contract of hire with an "employer" as defined in this title, and whether or not receiving payment from a third party.

If the employer is a partnership, or sole proprietorship, such employer may elect to include as an "employee" within the provisions of this act, any member of such partnership, or the owner of the sole proprietorship, devoting full time to the partnership or proprietorship business. In the event of such election, the employer must serve upon the employer's insurance carrier and the industrial accident board written notice naming the partners and/or sole proprietors to be covered, and no partner or sole proprietor shall be deemed an employee within this act until such notice has been given. For premium rate making the insurance carrier shall assume salary or wage of such electing "employee" to be five hundred dollars (\$500) per month.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2863, R. C. M. 1921; amd. Sec. 3, Ch. 121, L. 1925; amd. Sec. 1, Ch. 139, L. 1931; amd. Sec. 3, Ch. 88, L. 1945; amd. Sec. 1, Ch. 153, L. 1963; amd. Sec. 1, Ch. 308, L. 1971.

Effective Date

Section 2 of Ch. 308, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved March 15, 1971.

Amendments

The 1971 amendment added the language following "section 71-307" in the second paragraph; and added the third paragraph.

Airport Employee

Plaintiff under a contract of employment with the city-county airport was not an "actual" employee of the state of Montana under the accepted definitions. *Keller v. State*, — M —, 503 P 2d 29.

92-413. (2865) Beneficiary defined. "Beneficiary" means:

- (1) a surviving wife or husband;

- (2) an unmarried child under the age of eighteen (18) years;
- (3) an unmarried child under the age of twenty-two (22) years who is a full-time student in an accredited school;
- (4) an invalid child over the age of eighteen (18) years who is dependent upon the decedent for support at the time of injury;
- (5) a parent who is dependent upon the decedent for support at the time of the injury. However, such a parent is a beneficiary only when no beneficiary, as defined in subsections (1) through (4) of this section, exists; and
- (6) a brother or sister under the age of eighteen (18) years if dependent upon the decedent for support at the time of the injury. However, such a brother or sister is a beneficiary only until the age of eighteen (18) years and only when no beneficiary, as defined in subsections (1) through (5) of this section, exists.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2865, R. C. M. 1921; amd. Sec. 4, Ch. 121, L. 1925; amd. Sec. 1, Ch. 92, L. 1969; amd. Sec. 1, Ch. 331, L. 1973; amd. Sec. 1, Ch. 269, L. 1974.

Amendments

The 1969 amendment inserted “, or an unmarried child * * * accredited school” after “under the age of eighteen years.”

The 1973 amendment inserted “unmarried” in the first clause relating to children; increased the maximum age for student beneficiaries from twenty-one to twenty-two years; deleted “or if no surviving wife or husband then a surviving child or children under the age of eighteen years and an invalid child or invalid chil-

dren over the age of eighteen years” immediately before the proviso; and made minor clarifying changes in punctuation.

The 1974 amendment rewrote this section which read: “‘Beneficiary’ means and shall include a surviving wife or husband; an unmarried surviving child or children under the age of eighteen (18) years; or an unmarried child under the age of twenty-two (22) years who is a full-time student in an accredited school; an invalid child or invalid children over the age of eighteen (18) years; provided, however, that no invalid child over the age of eighteen (18) years shall be considered a beneficiary unless dependent upon the decedent for support at the time of injury.”

92-417. (2869) Child defined, to include whom. “Child” shall include a posthumous child, a dependent stepchild, a child legally adopted prior to the injury, an illegitimate child legitimized prior to the injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2869, R. C. M. 1921; amd. Sec. 2, Ch. 92, L. 1969.

Amendments

The 1969 amendment inserted “dependent” before “stepchild.”

92-418. (2870) Injury or injured defined. “Injury” or “injured” means:

(1) a tangible happening of a traumatic nature from an unexpected cause, or unusual strain, resulting in either external or internal physical harm, and such physical condition as a result therefrom and excluding disease not traceable to injury, except as provided in subsection 2 of this section.

(2) cardiovascular or pulmonary or respiratory diseases contracted by a paid fireman employed by a municipality, village or fire district as a regular member of a lawfully established fire department, which diseases are caused by over-exertion in times of stress or danger in the course of his employment by proximate exposure or by cumulative exposure

over a period of four (4) years or more to heat, smoke, chemical fumes, or other toxic gases.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2870, R. C. M. 1921; amd. Sec. 6, Ch. 162, L. 1961; amd. Sec. 6, Ch. 149, L. 1965; amd. Sec. 1, Ch. 270, L. 1967; amd. Sec. 1, Ch. 488, L. 1973.

Amendments

The 1965 amendment made no apparent change. But see *Lupien v. Montana Record Publishing Co.*, 143 M 415, 390 P 2d 455, 457.

The 1967 amendment inserted "or unusual strain" after "an unexpected cause."

The 1973 amendment divided the former language into the preliminary clause and subsection (1); added "except as provided in subsection 2 of this section" to the end of subsection (1); and added subsection (2).

Repealing Clause

Section 2 of Ch. 270, Laws 1967 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3 of Ch. 270, Laws 1967 provided the act should be in effect from and after its passage and approval. Approved March 2, 1967.

Aggravation of Pre-existing Condition

Four-year-old back injury aggravated by lifting heavy piece of material on job was not injury within purview of statute since claimant must establish that injury for which he seeks to recover is new injury resulting from unexpected cause. *Phelan v. Vogel*, 148 M 422, 422 P 2d 80.

Aneurysm

Workman who suffered aneurysm when right middle cerebral artery ruptured did not suffer compensable injury as defined in statute in light of evidence that at time of injury, he was engaged in performing ordinary activities of employment which would not cause aneurysm. *Miller v. Sundance Recreation, Inc.*, 151 M 223, 441 P 2d 194.

Burden of Proof

Claimant who injured hand and received compensation for such injury was properly denied compensation for alleged "disabling cardiac damage" and "cardiac neurosis" since claimant could produce no substantial evidence to support such claim. *Verdi v. American Smelting & Refining Co.*, 154 M 208, 461 P 2d 845.

Heart Attack

Where employee suffered fatal myocardial infarction at work but expert cardiologist testified that the attack was not a result of his employment, recovery was denied even though absolute proof was not possible. *Ness v. Diamond Asphalt Co.*, 143 M 560, 393 P 2d 43.

Relationship between Accident and Disability

Evidence of claimant's mental problems existing prior to accident and doctor's testimony that it was speculation that claimant's failure to return to work was caused by accident was sufficient to sustain judgment denying recovery under statute for claimant's failure to establish direct relationship between industrial accident and physical condition after such accident. *Schwartzkopf v. Industrial Accident Board*, 149 M 488, 428 P 2d 468.

Spinal Cancer

Workmen's compensation was properly denied where claimant's decedent's death resulted from a spinal cancer that was neither caused by nor contributed to by accident in which decedent fractured his dorsal spine, there being no causal connection between the fracture and the cancerous tumor of the spine which caused death. *Stordahl v. Rush Implement Co.*, 148 M 13, 417 P 2d 95, 98. (Dissenting opinion, 148 M 13, 417 P 2d 95, 99.)

Unusual Strain

Evidence that claimant, while in course and scope of employment, picked up heavy tray of dirty dishes from floor and suffered back strain and testimony of doctor that subsequent back condition resulted from unusual strain was sufficient to support claim of accidental injury within meaning of phrase "unusual strain" as used in statute. *Jones v. Bair's Cafes*, 152 M 13, 445 P 2d 923, explained in 157 M 328, 331, 485 P 2d 692.

Back injury consisting of a herniated disc, sustained when employee lifted mop pail full of water, resulted from a compensable "unusual strain" within meaning of this section. *Robins v. Ogle*, 157 M 328, 485 P 2d 692.

Claimant's testimony supporting two specific injuries, the first of which occurred while trying to lift a part of a meat grinder from a low sink and the second of which occurred one and one half month later while attempting to lift a fifty pound casing on a meat saw, coupled with evidence of a herniated disc which required surgery, constituted sufficient evi-

dence of an unusual strain caused by a tangible happening of a traumatic nature.

Love v. Ralph's Food Store, Inc. — M —, 516 P 2d 598.

DECISIONS UNDER FORMER LAW

Disease Not Traceable to Injury

Where claimant was being treated for bursitis prior to time she lifted box which allegedly caused injury to her shoulder, and surgeon who had operated on shoulder admitted only to the "possibility" of a supraspinatus tendon tear, there was insufficient evidence upon which either the industrial accident board or district court could base award. *La Forest v. Safeway Stores, Inc.*, 147 M 431, 414 P 2d 200.

Unexpected Cause

Claimant, whose routine job was lifting fifteen-pound blocks, was not entitled to compensation for back injury since strain from lifting blocks was not an injury resulting from an "unexpected cause." *James v. V. K. V. Lumber Co.*, 145 M 466, 401 P 2d 282, distinguished in *Jones v. Bair's Cafes*, 152 M 13, 445 P 2d 923.

92-418.1. Heart and lung disease of others not excluded by provision relating to firemen. Nothing herein shall be construed to exclude any other working person who suffers a cardiovascular, pulmonary or respiratory disease while in the course and scope of his employment.

History: En. Sec. 2, Ch. 488, L. 1973.

Title of Act

An act relating to the Workmen's Compensation Act; amending section 92-418, R. C. M. 1947, relating to the definition of "injury" or "injured" to provide for broadened coverage for firemen; and providing for an effective date.

Effective Date

Section 3 of Ch. 488, Laws 1973 provided the act should be in effect from and after its passage and approval. Approved March 27, 1973.

92-422. (2874) Repealed.

Repeal

Section 92-422 (Sec. 6, Ch. 96, L. 1915; Sec. 1, Ch. 175, L. 1971), defining the

work week, was repealed by Sec. 2, Ch. 445, Laws 1973.

92-423. (2875) Repealed.

Repeal

Section 92-423 (Sec. 6, Ch. 96, L. 1915), defining wages, was repealed by Sec. 2,

Ch. 444, Laws 1973. For new law, see sec. 92-423.1.

92-423.1. Wages defined. "Wages" means the average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week and overtime is not to be considered.

Sick leave benefits accrued by employees of "public corporations" as defined by section 92-434 are considered "wages."

History: En. 92-423.1 by Sec. 1, Ch. 444, L. 1973.

Title of Act

An act providing for a definition of "wages" in the Workmen's Compensation Act; and repealing section 92-423, R. C. M. 1947.

Repealing Clause

Section 2 of ch. 444, Laws 1973 read "Section 92-423, R. C. M. 1947, is repealed."

92-423.2. Average weekly wage defined. "Average weekly wage" means the mean weekly earnings of all employees under covered employment as

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defined and established annually by the division of employment security of the Montana department of labor and industry. It is established at the nearest whole dollar (\$1) number and shall be adopted by the division of workmen's compensation prior to July 1 of each year.

History: En. 92-423.2 by Sec. 1, Ch. 445, L. 1973.

92-425. (2877) Husband or widower defined. "Husband" or "widower" means only a husband or widower living with, or legally entitled to be supported by the deceased at the time of her injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2877, R. C. M. 1921; amd. Sec. 1, Ch. 33, L. 1974.

Amendments

The 1974 amendment deleted "incapable of supporting himself, and" after "widower" and before "living with."

92-435. (2887) Insurer defined. "Insurer" means any insurance company authorized to transact business in this state insuring any employer under this act and includes industrial insurance account created by this act, known as the "state fund."

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2887, R. C. M. 1921; amd. Sec. 1, Ch. 151, L. 1973.

Amendments

The 1973 amendment added "and includes industrial insurance account created by this act, known as the 'state fund'."

92-438. (2890) Repealed.**Repeal**

Section 92-438 (Sec. 6, Ch. 96, L. 1915; Sec. 1, Ch. 49, L. 1965), defining "inde-

pendent contractor," was repealed by Sec. 2, Ch. 251, Laws 1973. For new law, see sec. 92-438.1.

92-438.1. Independent contractor defined. An "independent contractor" is one who renders service in the course of an occupation and:

(1) has been and will continue to be free from control or direction over the performance of the services, both under his contract and in fact; and

(2) is engaged in an independently established trade, occupation, profession or business.

History: En. 92-438.1 by Sec. 1, Ch. 251, L. 1973.

DECISIONS UNDER FORMER LAW**General Contractor's Liability**

Where injured employee's immediate employer was independent contractor and was required by general employer to carry workmen's compensation insurance under which injured employee received compensation, general employer was immune under former section 92-438 from common-law liability. *Ashcraft v. Montana Power Co.*, 156 M 368, 480 P 2d 812.

Where independent contractor defense

is not applicable to general employer, general employer is substituted for immediate employer and is liable under Workmen's Compensation Act, so that claimant cannot maintain common-law personal injury action against general employer. *Campbell v. Shell Oil Co.*, 329 F Supp 846.

Bank which required independent contractor to provide workmen's compensation coverage against the claims of employees of a subcontractor was immune

from suit by employee of subcontractor to recover damages suffered, allegedly due to bank's negligence. State ex rel. First

Nat. Bank & Trust Co. v. District Court, — M —, 505 P 2d 408.

92-439. Temporary total disability defined. "Temporary total disability" means a condition resulting from an injury as defined in this act that results in total loss of wages and exists until the injured workman is as far restored as the permanent character of the injuries will permit.

History: En. 92-439 by Sec. 1, Ch. 107, L. 1973.

Title of Act

An act providing for a definition of "temporary total disability" in the Workmen's Compensation Act.

92-440. Permanent partial disability defined. "Permanent partial disability" means a condition resulting from injury as defined in this act that results in the actual loss of earnings or earning capability less than total that exists after the injured workman is as far restored as the permanent character of the injuries will permit.

History: En. 92-440 by Sec. 1, Ch. 108, L. 1973.

Title of Act

An act providing for a definition of "permanent partial disability" in the Workmen's Compensation Act.

92-441. Permanent total disability defined. "Permanent total disability" means a condition resulting from injury as defined in this act that results in the loss of actual earnings or earning capability that exists after the injured workman is as far restored as the permanent character of the injuries will permit and which results in the workman having no reasonable prospect of finding regular employment of any kind in the normal labor market.

History: En. 92-441 by Sec. 1, Ch. 109, L. 1973.

Title of Act

An act providing for a definition of "permanent total disability" in the Workmen's Compensation Act.

CHAPTER 5—COMPENSATION TO CERTAIN HEIRS AND BENEFICIARIES

92-501. (2891) Repealed.

Repeal

Section 92-501 (Sec. 7, Ch. 96, L. 1915; Sec. 7, Ch. 121, L. 1925; Sec. 1, Ch. 53, L. 1937), relating to eligibility as bene-

ficiaries of children, brothers and sisters, was repealed by Sec. 1, Ch. 106, Laws 1973.

92-503 to 92-505. (2893 to 2895) Repealed.

Repeal

Sections 92-503 to 92-505 (Sec. 8, Ch. 96, L. 1915), relating to eligibility as bene-

ficiaries of persons residing outside the United States, were repealed by Sec. 1, Ch. 106, Laws 1973.

CHAPTER 6—CLAIMS—LIABILITY FOR INJURY UNDER DIFFERENT PLANS OF ACT

Section 92-601. Claims must be presented within what time.

92-614. Who liable for injuries under the different plans of act and in what amounts, extraterritorial application and reciprocity.

92-615. Notice of denial of claim by insurer.

92-616. Costs and attorneys' fees payable on denial of claim later found compensable.

92-601. (2899) Claims must be presented within what time. In case of personal injury or death, all claims shall be forever barred unless presented in writing to the employer, the insurer, or the division, as the case may be, within twelve (12) months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf.

The division may, upon a reasonable showing by the claimant of lack of knowledge of disability, waive the time requirement, up to an additional twenty-four (24) months.

History: En. Sec. 10, Ch. 96, L. 1915; amd. Sec. 3, Ch. 100, L. 1919; re-en. Sec. 2899, R. C. M. 1921; amd. Sec. 1, Ch. 34, L. 1935; amd. Sec. 1, Ch. 264, L. 1973.

Amendments

The 1973 amendment deleted "under oath" following "in writing" in the first paragraph; substituted "division" for "board"; added the second paragraph; and made a minor change in style.

Estoppel to Invoke Statute

Industrial accident board's dismissal of claimant's workmen's compensation claim was proper where action was not commenced until twenty-three months after expiration of limitation period provided for in this section, and claimant failed to produce evidence which would indicate existence of latent injury or actions which would estop employer from invoking statute of limitations. *Vetsch v. Helena Transfer & Storage Co.*, 154 M 106, 460 P 2d 757.

Since the burden is on claimant to file a claim and not on the insurer to solicit claims, insurer which deviated from its standard procedure by failing to send claimant a letter advising him to file a claim within one year and by neglecting to file the medical report with the board for

several years was not estopped from relying on the statute of limitations where claimant was never misled by anyone connected with the insurer or the industrial accident board; any mistake in understanding of the law made by attorney who represented both claimant and employer in suit against third-party tort-feasor established no basis for estoppel where attorney had no knowledge of any mistake on his part and no intent to mislead claimant. *Ricks v. Teslow Consol.*, — M —, 512 P 2d 1304.

Multiple Claims

Claimant who filed a claim for compensation on January 16, 1969, covering an injury on August 26, 1968, was not barred from asserting claim to compensation arising from injury on July 12, 1968 where the two injuries were closely related and where the employer and his insurer had actual knowledge of the claim long before one year had elapsed following the alleged injury. *Love v. Ralph's Food Store, Inc.*, — M —, 516 P 2d 598.

References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698; *Meyer v. Noble Drilling, Inc.*, 259 F Supp 110, 112.

92-604. (2901) Employer liable when lets work, etc.

Common-Law Remedy

Where independent contractor defense is not applicable to general employer, general employer is substituted for immediate employer of claimant and is liable under Workmen's Compensation Act, so that claimant cannot maintain common-law personal injury action against general employer. *Campbell v. Shell Oil Co.*, 329 F Supp 846.

Independent Contractor's Coverage

Bank which required independent contractor to provide workmen's compensation coverage against the claims of employees of a subcontractor was immune from suit by employee of subcontractor to recover damages suffered, allegedly due to bank's negligence. *State ex rel. First Nat. Bank & Trust Co. v. District Court*, — M —, 505 P 2d 408.

92-608. (2905) Compensation in case of death of employee, etc.

Death from Cause other than Injury

Clause providing that "if the employee

shall die from some cause other than the injury, there shall be no liability for com-

pensation after his death" means that if employee is receiving compensation as result of industrial injury and subsequently dies from causes other than injury, liability for further compensation by way of death benefits or continuing disability benefits is cut off; but statute does not terminate liability for compensation accrued prior to death and unpaid at time of death; thus, compensation for permanent partial disability existing between time of injury and time of death is payable even after death. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

"Proximate Cause" Defined

"Proximate cause" as used in statute, means that cause which in natural and continuous sequence, unbroken by any new and independent cause produces

death, without which it would not have occurred; it does not mean that injury must be sole cause of death but that injury must be substantial contributing cause in sense that death would not have occurred but for injuries. Head injury received in compensable industrial accident occurring more than two years previous to death was not proximate cause of death in view of evidence that deceased drank to excess before and after accident, that immediate cause of death was suffocation from vomit after drinking bout and that even if deceased had taken six nembutal tablets given on prescription of doctor to relieve headaches, it could not have caused or contributed to death. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

92-610. (2907) Repealed.

Repeal

Section 92-610 (Sec. 14, Ch. 96, L. 1915; Sec. 1, Ch. 177, L. 1929), relating to con-

tracts for hospital benefits, was repealed by Sec. 1, Ch. 106, Laws 1973.

92-614. (2911) **Who liable for injuries under the different plans of act and in what amounts, extraterritorial application and reciprocity.** Every employer who shall become bound by and subject to the provisions of compensation plan number one (1), and every employer and insurer who shall become bound by and subject to the provisions of compensation plan number two (2), and the industrial accident fund where the employer of the injured employee has become bound by and subject to the provisions of compensation plan No. 3, shall be liable for the payment of compensation in the manner and to the extent hereinafter provided to an employee who has elected to come under this act, and who shall receive an injury arising out of and in the course of his employment, or, in the case of his death from such injury, to his beneficiaries, if any; or, if none, to his major dependents, if any; or, if none, to his minor dependents, if any.

If a workman employed in this state who is subject to the provisions of this act temporarily leaves the state incidental to that employment and receives an injury arising out of and in the course of such employment, the provisions of this act shall apply to such workman as though he were injured within this state.

If a workman from another state and his employer from another state are temporarily engaged in work within this state, this act shall not apply to them

(a) if the employer and employee are bound by the provisions of the Workmen's Compensation Law or similar law of such other state which applies to them while they are in the state of Montana, and

(b) if the Workmen's Compensation Act of this state is recognized and given effect as the exclusive remedy for workmen employed in this state who are injured while temporarily employed in such other state.

A certificate from an authorized officer of the workmen's compensation department or similar agency of another state certifying that an employer of such other state is bound by the Workmen's Compensation Act of the state and that its act will be applied to employees of the employer while in the state of Montana shall be prima facie evidence of the application of the Workmen's Compensation Law of the certifying state.

The industrial accident board shall have authority, with the approval of the governor, to enter into agreements with workmen's compensation agencies of other states for the purpose of promulgating regulations not inconsistent with the provisions of this act to carry out the extraterritorial application of the workmen's compensation laws of the agreeing states.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2911, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1967.

Amendments

The 1967 amendment inserted figures after the written numbers in the first paragraph; and added everything after the first paragraph.

92-615. Notice of denial of claim by insurer. Every insurer under any plan for the payment of workmen's compensation benefits shall within thirty (30) days of receipt of a claim for compensation either accept or deny the claim, and if denied shall inform the claimant and the division in writing of such denial. If the insurer determines to deny a claim on which payments have been made during a time of further investigation, or after a claim has been accepted, terminates biweekly compensation benefits, it may do so only after fifteen (15) days' written notice to the claimant and the division. However, an insurer may, after written notice to the claimant and the division, make payment of compensation benefits within thirty (30) days of receipt of a claim for compensation without such payments being construed as an admission of liability or a waiver of any right of defense.

History: En. Sec. 1, Ch. 477, L. 1973; amd. Sec. 1, Ch. 173, L. 1974.

Title of Act

An act requiring the insurer to accept or deny a claim within thirty (30) days of its filing; payment of weekly compensation until claimant returns to work; termination of compensation only upon notice and division approval; and payment of costs.

Amendments

The 1974 amendment inserted "for compensation" following "receipt of a claim" in the first sentence; inserted "and the

division" after "inform the claimant" in the first sentence; deleted a sentence which read: "Biweekly compensation benefits shall be continuously paid until the claimant is fully released by his doctor, returns to work, or no longer suffers a loss of earnings capacity"; rewrote the present second sentence which read: "If the insurer determines to initially deny a claim, or after a claim has been accepted, terminates biweekly compensation benefits, it may do so only after fifteen (15) days written notice to the claimant and the division, and after written approval of the division"; and added the last sentence.

92-616. Costs and attorneys' fees payable on denial of claim later found compensable. In the event the insurer denies the claim for compensation or terminates compensation benefits, and the claim is later adjudged compensable, by the division or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the division. However, under rules adopted by the division and in the discretion of the divi-

sion, an insurer may suspend compensation payments for not more than thirty (30) days pending the receipt of medical information.

History: En. Sec. 2, Ch. 477, L. 1973; amd. Sec. 2, Ch. 173, L. 1974.

Amendments

The 1974 amendment rewrote this section which read: "In the event the insurer denies the claim, or terminates a claim that has already been accepted, and the claim is later determined to be compensable either through hearing or appeal

to the courts, the insurer shall pay all costs incurred by the claimant, including reasonable attorneys' fees as established by the division."

Effective Date

Section 3 of Ch. 173, Laws 1974 provided the act should be in effect from and after its passage and approval. Approved March 11, 1974.

CHAPTER 7—COMPENSATION FOR VARIOUS INJURIES— AMOUNT—PAYMENT

- Section 92-701.1. Compensation for injuries producing temporary total disability.
 92-702.1. Compensation for injuries producing total permanent disability.
 92-703.1. Compensation for injuries causing partial disability.
 92-704.1. Compensation for injury causing death.
 92-704.2. Application of act.
 92-705. Providing for payment of burial expense.
 92-706.1. Medical and hospital services approved by the division are furnished.
 92-707. Compensation from what date paid.
 92-708. Compensation to run consecutively—manner of payment.
 92-709. Compensation in case of specified injuries.
 92-709.1. Subsequent injury provisions—fund—procedures.
 92-710. Occupational deafness.

92-701. (2912) Repealed.

Repeal

Section 92-701 (Sec. 16, Ch. 96, L. 1915; Sec. 4, Ch. 100, L. 1919; Sec. 10, Ch. 121, L. 1925; Sec. 12, Ch. 177, L. 1929; Sec. 1, Ch. 230, L. 1947; Sec. 1, Ch. 7, L. 1949; Sec. 1, Ch. 48, L. 1951; Sec. 1, Ch. 38, L. 1953; Sec. 1, Ch. 253, L. 1955; Sec. 1, Ch.

234, L. 1957; Sec. 1, Ch. 162, L. 1961; Sec. 1, Ch. 149, L. 1965; Sec. 1, Ch. 207, L. 1967; Sec. 1, Ch. 285, L. 1969; Sec. 1, Ch. 174, L. 1971), relating to compensation for temporary total disability, was repealed by Sec. 2, Ch. 471, Laws 1973. For new law, see sec. 92-701.1.

92-701.1. Compensation for injuries producing temporary total disability. Weekly compensation benefits for injury producing total temporary disability shall be sixty-six and two-thirds per cent (66 2/3%) of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed one hundred ten dollars (\$110) beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total temporary disability benefits shall be paid for the duration of the worker's temporary disability.

In cases where it is determined that periodic benefits granted by the Social Security Act, 42 U.S.C. 301 (1935), are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero (0), by an amount equal, as nearly as practical, to one-half (1/2) the federal periodic benefits for such week.

History: En. 92-701.1 by Sec. 1, Ch. 471, L. 1973.

Repealing Clause

Section 2 of Ch. 471, Laws 1973 read "Section 92-701, R. C. M. 1947, is repealed."

Title of Act

An act providing compensation for injuries producing total temporary disability under the Workmen's Compensation Act; repealing section 92-701, R. C. M. 1947.

92-702. (2913) Repealed.**Repeal**

Section 92-702 (Sec. 16, Ch. 96, L. 1915; Sec. 5, Ch. 100, L. 1919; Sec. 11, Ch. 121, L. 1925; Sec. 13, Ch. 177, L. 1929; Sec. 2, Ch. 230, L. 1947; Sec. 2, Ch. 7, L. 1949; Sec. 2, Ch. 48, L. 1951; Sec. 2, Ch. 38, L. 1953; Sec. 2, Ch. 253, L. 1955; Sec. 2, Ch.

234, L. 1957; Sec. 2, Ch. 162, L. 1961; Sec. 2, Ch. 149, L. 1965; Sec. 2, Ch. 207, L. 1967; Sec. 1, Ch. 279, L. 1969), relating to compensation for permanent total disability, was repealed by Sec. 2, Ch. 202, Laws 1973. For new law, see sec. 92-702.1.

92-702.1. Compensation for injuries producing total permanent disability. Weekly compensation benefits for injury producing total permanent disability shall be sixty-six and two-thirds per cent (66 2/3%) of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total permanent disability benefits shall be paid for the duration of the worker's total permanent disability.

In cases where it is determined that periodic benefits granted by the Social Security Act, 42 U.S.C. 301 (1935), are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero (0), by an amount equal, as nearly as practical, to one-half (1/2) the federal periodic benefits for such week.

History: En. 92-702.1 by Sec. 1, Ch. 202, L. 1973; amd. Sec. 1, Ch. 272, L. 1974.

Title of Act

An act providing compensation for injuries producing total permanent disability under the Workmen's Compensation Act; repealing section 92-702, R. C. M. 1947.

Amendments

The 1974 amendment rewrote part of the second paragraph following "payable under this section" which read: "shall be reduced by the amount of the federal periodic benefits for such week."

Repealing Clause

Section 2 of Ch. 202, Laws 1973 read "Section 92-702, R. C. M. 1947, is repealed."

92-703. (2914) Repealed.**Repeal**

Section 92-703 (Sec. 16, Ch. 96, L. 1915; Sec. 6, Ch. 100, L. 1919; Sec. 2, Ch. 177, L. 1929; Sec. 3, Ch. 230, L. 1947; Sec. 3, Ch. 7, L. 1949; Sec. 3, Ch. 48, L. 1951; Sec. 3, Ch. 38, L. 1953; Sec. 3, Ch. 253,

L. 1955; Sec. 3, Ch. 234, L. 1957; Sec. 3, Ch. 162, L. 1961; Sec. 3, Ch. 149, L. 1965; Sec. 3, Ch. 207, L. 1967), relating to compensation for partial disability, was repealed by Sec. 2, Ch. 155, Laws 1973. For new law, see sec. 92-703.1.

92-703.1. Compensation for injuries causing partial disability. Weekly compensation benefits for injury producing partial disability shall be sixty-six and two-thirds per cent (66 2/3%) of the difference between the wages received at the time of the injury and the wages that the injured employee is capable of earning thereafter, subject to a maximum compensation of sixty dollars (\$60) a week.

The compensation shall be paid during the period of disability, not exceeding however, five hundred (500) weeks in cases of partial disability; provided, however, that compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in section 92-709 for the loss of the member.

History: En. 92-703.1 by Sec. 1, Ch. 155, L. 1973.

Title of Act

An act providing for compensation for injuries producing partial disability under the Workmen's Compensation Act; repealing section 92-703, R. C. M. 1947.

Repealing Clause

Section 2 of Ch. 155, Laws 1973 read "Section 92-703, R. C. M. 1947, is repealed."

DECISIONS UNDER FORMER LAW

Compensable Disability

Test of compensable disability was difference between wages received at time of injury and wages injured employee was able to earn thereafter in any suitable field of employment or profession subsequently entered under normal conditions, whether or not his earnings in that field were commonly called "wages." *Olson v. Manion's Inc.*, — M —, 510 P 2d 6, 9.

Computation of Average Weekly Wage

Former section 92-703 did not incorporate the six-day week component under former section 92-422 in determining pre- or post-injury earnings for partial disability, and in this manner was different from former sections 92-701 and 92-702, which dealt with total disability. *Mahlum v. Broeder*, 147 M 386, 412 P 2d 572.

Pre- or post-injury compensation for partial disability under former section 92-703 was determined by dividing a man's earnings over a reasonable period of time by the total number of days he worked, excluding all overtime and then multiply-

ing the average daily wage by the number of days actually worked each week. *Mahlum v. Broeder*, 147 M 386, 412 P 2d 572.

Earning Capacity—Loss of Earnings

Under former section 92-703, coupled with section 92-709, a claimant could have an award of temporary total disability payments during period he was entirely disabled, an award of temporary partial disability payments while his injury was still healing and he was partially able to earn wages, and an additional award for loss of prospective future earnings as the result of permanent partial disability. *Jones v. Claridge*, 145 M 326, 400 P 2d 888.

Wages Received at Time of Injury

Court found no room for interpretation of words "wages received at the time of the injury" in this section, despite directive of section 92-838 to construe provisions of Compensation Act liberally. *Olson v. Manion's Inc.*, — M —, 510 P 2d 6, 9.

92-704. (2915) Repealed.

Repeal

Section 92-704 (Sec. 16, Ch. 96, L. 1915; Sec. 7, Ch. 100, L. 1919; Sec. 12, Ch. 121, L. 1925; Sec. 14, Ch. 177, L. 1929; Sec. 4, Ch. 230, L. 1947; Sec. 4, Ch. 7, L. 1949; Sec. 4, Ch. 48, L. 1951; Sec. 4, Ch. 38, L. 1953; Sec. 4, Ch. 253, L. 1955; Sec. 4, Ch.

234, L. 1957; Sec. 4, Ch. 162, L. 1961; Sec. 4, Ch. 149, L. 1965; Sec. 1, Ch. 192, L. 1967; Sec. 4, Ch. 207, L. 1967), relating to compensation for injuries causing death, was repealed by Sec. 2, Ch. 203, Laws 1973. For new law, see sec. 92-704.1.

92-704.1. Compensation for injury causing death. (1) To beneficiaries as defined in section 92-413, subsections (1) through (4), weekly compensation benefits for injury causing death shall be sixty-six and two-thirds per cent (66 2/3%) of the decedent's wages. The maximum weekly compensation benefits shall not exceed the state's average weekly wage. The minimum weekly compensation for death shall be fifty per cent (50%) of the state's average weekly wage, but in no event shall it exceed the decedent's actual wages at the time of his death.

(2) To beneficiaries as defined in section 92-413, subsections (5) and (6), weekly benefits shall be paid to the extent of the dependency at the time of the injury, subject to a maximum of sixty-six and two-thirds per cent (66 2/3%) of the decedent's wages. The maximum weekly compensation shall not exceed the state's average weekly wage.

(3) If the decedent leaves no beneficiary as defined in section 92-413, a lump sum payment of three thousand dollars (\$3,000) shall be paid to the decedent's surviving parent or parents.

(4) Death benefits shall be paid to a widow or widower for life or until remarriage, and in the event of remarriage two (2) years' benefits shall be paid in a lump sum to the widow or widower. In all cases, benefits shall be paid to beneficiaries as defined in section 92-413.

History: En. 92-704.1 by Sec. 1, Ch. 203, L. 1973; amd. Sec. 2, Ch. 269, L. 1974; amd. Sec. 1, Ch. 270, L. 1974; amd. Sec. 2, Ch. 272, L. 1974.

Compiler's Notes

This section was amended three times in 1974, once by Ch. 269, once by Ch. 270, and once by Ch. 272. All of the amendatory acts deleted a paragraph quoted in the amendment note below and additional changes were made by Ch. 269. Since the amendments do not appear to conflict, the compiler has made a composite section embodying the changes made by all amendments.

Title of Act

An act providing compensation for injuries causing death under the Workmen's Compensation Act; repealing section 92-704, R. C. M. 1947.

Amendments

Chapter 269, Laws of 1974, inserted the

subsection designation (1); inserted "to beneficiaries as defined in section 92-413, subsections (1) through (4)" at the beginning of subsection (1); inserted subsections (2) and (3); inserted the subsection designation (4); substituted "section 92-413" for "this act" at the end of subsection (4); and deleted a final paragraph which read: "In cases where it is determined that periodic benefits granted by the Social Security Act, 42 U. S. C. 301 (1935), are payable because of the injury causing death, the weekly benefits payable under this section shall be reduced by the amount of the federal periodic benefits for such week."

Chapters 270 and 272, Laws of 1974, deleted the paragraph quoted above in this note.

Repealing Clause

Section 2 of Ch. 203, Laws 1973 read "Section 92-704, R. C. M. 1947, is repealed."

92-704.2. Application of act. The provisions of this act apply prospectively only. However, the division shall pay to any widow, widower or beneficiary who did or shall become eligible for compensation for injury causing death after June 30, 1973, and before July 1, 1974, such sum or sums necessary to bring the total amount of compensation paid or to be paid as long as such person has, or remains eligible for compensation, to the amount such person would have received without the reduction for benefits granted by the Social Security Act. The division shall pay such sums in a lump sum as to compensation periods past and bi-weekly as to compensation to become due and from a special fund appropriated for this purpose.

History: En. 92-704.2 by Sec. 2, Ch. 270, L. 1974.

Title of Act

An act to amend section 92-704.1, R. C. M. 1947, relating to benefit reductions under the Workmen's Compensation Act; authorizing the division to make certain payments; and providing an effective date.

Effective Date

Section 3 of Ch. 270, Laws 1974 provided the act should be in effect from and after its passage and approval. Approved March 22, 1974.

92-705. Providing for payment of burial expense. There shall be paid, in case of the death of an employee, which death is the result of an accidental injury arising out of the employment and happening in the course of the employment, the reasonable burial expenses of the employee, not

exceeding one thousand one hundred dollars (\$1,100) and such payment is not a part of the compensation which might be paid but is a benefit in addition to and separate and apart from compensation.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 2, Ch. 196, L. 1921; re-en. Sec. 2916, R. C. M. 1921; amd. Sec. 13, Ch. 121, L. 1925; amd. Sec. 1, Ch. 128, L. 1943; amd. Sec. 1, Ch. 213, L. 1945; amd. Sec. 6, Ch. 38, L. 1953; amd. Sec. 5, Ch. 234, L. 1957; amd. Sec. 1, Ch. 194, L. 1974.

Amendments

The 1974 amendment increased the maximum burial expense payment from \$500 to \$1,100.

92-706. (2917) Repealed.

Repeal

Section 92-706 (Sec. 16, Ch. 96, L. 1915; Sec. 3, Ch. 196, L. 1921; Sec. 14, Ch. 121, L. 1925; Sec. 15, Ch. 177, L. 1929; Sec. 2, Ch. 139, L. 1931; Sec. 1, Ch. 229, L. 1943; Sec. 2, Ch. 213, L. 1945; Sec. 1, Ch. 41, L. 1949; Sec. 7, Ch. 38, L. 1953; Sec. 5, Ch.

253, L. 1955; Sec. 6, Ch. 234, L. 1957; Sec. 1, Ch. 81, L. 1965; Sec. 1, Ch. 67, L. 1969; Sec. 1, Ch. 359, L. 1971), relating to medical and hospital services and other approved treatment, was repealed by Sec. 2, Ch. 252, Laws 1973. For new law, see sec. 92-706.1.

92-706.1. Medical and hospital services approved by the division are furnished. In addition to the compensation provided by this act and as an additional benefit separate and apart from compensation, the following shall be furnished:

During the first thirty-six (36) months after the happening of the injury, the employer or insurer shall furnish reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the division for the injuries sustained. The division, upon application of the injured workman may, for good cause, grant reasonable extensions of the benefits provided in this section.

All hospitals must submit to the division of workmen's compensation, a schedule of fees and charges for treatment of injured workmen to be in effect for at least a twelve (12) month period unless the division and the hospital agree to interim amendments of the schedule. The schedule must be submitted at least thirty (30) days prior to its effective date and shall not exceed the charges prevailing in the hospital for similar treatment of private patients.

History: En. 92-706.1 by Sec. 1, Ch. 252, L. 1973.

Act; repealing section 92-706, R. C. M. 1947.

Title of Act

An act providing for medical and hospital services to be furnished injured claimants under the Workmen's Compen-

Repealing Clause

Section 2 of ch. 252, Laws 1973 read "Section 92-706, R. C. M. 1947, is repealed."

92-707. (2918) Compensation from what date paid. When an injured employee has no wife, child, father, mother, brother or sister residing within the United States who would be entitled to compensation in case of his death, no compensation shall be allowed or paid during the first week of any injury, except as may be required by the provisions of the preceding section, but if disability continues one (1) week, compensation shall be paid from the date of injury. Where the injured em-

ployee has a beneficiary or a major or minor dependent residing within the United States who would be entitled to compensation in case of his death, no compensation shall be paid for the first week of any injury, but if disability continues one (1) week, compensation shall be paid from the date of injury; provided, that separate benefits of medical and hospital services shall be furnished from date of injury.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 4, Ch. 196, L. 1921; re-en. Sec. 2918, R. C. M. 1921; amd. Sec. 3, Ch. 177, L. 1929; amd. Sec. 3, Ch. 213, L. 1945; amd. Sec. 5, Ch. 7, L. 1949; amd. Sec. 1, Ch. 144, L. 1969.

Amendments

The 1969 amendment substituted "one (1) week" for "six weeks" in the first sentence, and "one (1) week" for "three weeks" in the second sentence.

92-708. (2919) Compensation to run consecutively—manner of payment. Compensation shall run consecutively and not concurrently and payment shall not be made for two (2) classes of disability over the same period. Compensation due to beneficiaries shall be paid to the surviving spouse, if any, or if none, then divided equally among or for the benefit of the children. In cases where beneficiaries are a surviving spouse and stepchildren of such spouse the compensation shall be divided equally among all beneficiaries. Compensation due to beneficiaries as defined in section 92-413, subsections (5) and (6) where there is more than one (1), shall be divided equitably among them and the question of dependency and amount thereof shall be a question of fact for determination by the division.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2919, R. C. M. 1921; amd. Sec. 15, Ch. 121, L. 1925; amd. Sec. 4, Ch. 213, L. 1945; amd. Sec. 7, Ch. 235, L. 1947; amd. Sec. 7, Ch. 253, L. 1955; amd. Sec. 1, Ch. 205, L. 1973; amd. Sec. 3, Ch. 269, L. 1974.

Amendments

The 1973 amendment deleted two provisos reading "provided that the total period over which compensation shall be payable for two or more classes of disability, including death, resulting from any compensable injury, shall not extend for a period of more than five hundred (500) weeks, and provided that no compensation shall be paid to a major or minor dependent who did not reside in the United States at the date of the happening of the

injury" from the end of the first sentence; and substituted "division" for "board" at the end of the fourth sentence.

The 1974 amendment substituted "surviving spouse" for "surviving widow" in two places in the third sentence and rewrote the fourth sentence which read: "Compensation due to major dependents where there be more than one (1), shall be divided equitably among them and likewise as to minor dependents, and the question of dependency and amount thereof shall be a question of fact for determination by the division."

Effective Date

Section 4 of Ch. 269, Laws 1974 provided the act should be in effect from and after its passage and approval. Approved March 21, 1974.

92-709. (2920) Compensation in case of specified injuries. In case of the following specified injuries, compensation for temporary total disability shall be paid at the weekly rate provided in section 92-701.1, during the healing period, but in no event shall the healing period for loss of a member exceed twenty-six (26) weeks. In addition thereto but in lieu of any other compensation provided by this act, compensation for loss of a member shall be paid at the weekly rate provided in section 92-703.1, and shall be paid for the following periods:

For loss of:

One arm at or near shoulder	280 weeks
One arm at the elbow	240 weeks
One arm between wrist and elbow	220 weeks
One hand	200 weeks
One thumb and the metacarpal bone thereof	75 weeks
One thumb at the proximal joint	37 weeks
One thumb at the second distal joint	25 weeks
One first finger and the metacarpal bone thereof	40 weeks
One first finger at the proximal joint	30 weeks
One first finger at the second joint	22 weeks
One first finger at the distal joint	15 weeks
One second finger and the metacarpal bone thereof	37 weeks
One second finger at the proximal joint	20 weeks
One second finger at the second joint	15 weeks
One second finger at the distal joint	8 weeks
One third finger and the metacarpal bone thereof	25 weeks
One third finger at the proximal joint	15 weeks
One third finger at the second joint	10 weeks
One third finger at the distal joint	5 weeks
One fourth finger and the metacarpal bone thereof	15 weeks
One fourth finger at the proximal joint	11 weeks
One fourth finger at the second joint	8 weeks
One fourth finger at the distal joint	6 weeks
One leg at or near the hip joint as to preclude the use of an artificial limb	300 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb	200 weeks
One leg between knee and ankle	190 weeks
One foot at the ankle	180 weeks
One great toe with the metatarsal bone thereof	37 weeks
One great toe at the proximal joint	18 weeks
One great toe at the second joint	12 weeks
One toe other than the great toe with the metatarsal bone thereof	16 weeks
One toe other than the great toe at the proximal joint	8 weeks
One toe other than the great toe at second or distal joint	5 weeks
One eye by enucleation	165 weeks
Total blindness of one eye	140 weeks
Total loss of hearing, one ear	40 weeks
Total loss of hearing, both ears	200 weeks

In all cases of permanent injury to a member less than loss of the member compensation shall be paid for total temporary disability, without limitation as to time under section 92-701.1. In addition thereto, indemnity benefits for permanent disability to a member or members shall be proportionate to loss or loss of use of the member or members at the weekly rate provided in section 92-703.1. In all other cases of permanent injury, less than total, not included in the above schedule, the compensation for

partial disability shall bear such relation to the periods stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule or to partial disability (500 weeks).

Loss of vision: Where central visual acuity does not exceed 20/200 in the better eye with correcting lenses or the widest diameter of the visual field subtends an angle no greater than 20 degrees, the same as for loss of the eye.

Total loss of use: Indemnity benefits for permanent total loss of use of a member shall be the same as for loss of the member.

Disfigurement: The division may award proper and equitable indemnity benefits for serious face, head, or neck disfigurement, not to exceed twenty-five hundred dollars (\$2,500) in addition to any other indemnity benefits payable under this section.

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two (2) thereof, in one (1) accident, in the absence of conclusive proof to the contrary shall constitute total disability, permanent in character. Provided, however, that the percentage of permanent disability caused by any single accident or injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any previous physical ailment or defect or to any injury previously suffered or any permanent disability caused thereby; provided, that no payment under this section shall be in lieu of the separate benefit of medical and hospital services.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 8, Ch. 100, L. 1919; amd. Sec. 5, Ch. 196, L. 1921; re-en. Sec. 2920, R. C. M. 1921; amd. Sec. 16, Ch. 121, L. 1925; amd. Sec. 16, Ch. 177, L. 1929; amd. Sec. 5, Ch. 213, L. 1945; amd. Sec. 5, Ch. 230, L. 1947; amd. Sec. 6, Ch. 7, L. 1949; amd. Sec. 5, Ch. 48, L. 1951; amd. Sec. 5, Ch. 38, L. 1953; amd. Sec. 6, Ch. 253, L. 1955; amd. Sec. 7, Ch. 234, L. 1957; amd. Sec. 5, Ch. 162, L. 1961; amd. Sec. 5, Ch. 149, L. 1965; amd. Sec. 5, Ch. 207, L. 1967; amd. Sec. 1, Ch. 140, L. 1971; amd. Sec. 1, Ch. 204, L. 1973.

end of the preliminary paragraph from \$31.50 to \$34.50.

The 1971 amendment completely rewrote the preliminary paragraph; for previous text, see parent volume and above notes relating to 1965 and 1967 amendments. The 1971 amendment also inserted "In all other cases of permanent injury, less than total, not included in the above schedule, the compensation shall bear such relation to the periods stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule or to total disability (500 weeks)" following the schedule of injuries; and made minor changes in phraseology.

Amendments

The 1965 amendment increased the maximum weekly compensation set forth in the various clauses in the preliminary paragraph from \$29 to \$35, from \$32 to \$38, from \$36 to \$42, from \$40 to \$46, from \$45 to \$51, and from \$50 to \$56; and increased the minimum weekly compensation set forth at the end of the preliminary paragraph from \$25.50 to \$31.50.

The 1967 amendment increased the maximum weekly compensation set forth in the various clauses in the preliminary paragraph from \$35 to \$37 per week; from \$38 to \$40 per week; from \$42 to \$45 per week; from \$46 to \$50 per week; from \$51 to \$55 per week; from \$56 to \$60 per week; and increased the minimum weekly compensation set forth at the

The 1973 amendment changed the statutory reference in the first sentence from 92-701 to 92-701.1; inserted "for loss of a member" twice in the preliminary clause; changed the statutory reference in the second sentence from 92-703 to 92-703.1; inserted the first two sentences following the schedule of payments; inserted "for partial disability" in the third sentence following the schedule of payments; substituted "partial" for "total" in the third sentence following the schedule of payments; deleted two paragraphs between the paragraphs headed "Total loss of use" and "Disfigurement"; substituted "division" for "board" under "Disfigurement"; and made a minor change in style.

DECISIONS UNDER FORMER LAW

Additional Compensation

Under this section, coupled with former section 92-703, a claimant could have had an award of temporary total disability payments during period he was entirely disabled, an award of temporary partial disability payments while his injury was still healing and he was partially able to earn wages, and an additional award for loss of prospective future earnings as the result of permanent partial disability. Jones v. Claridge, 145 M 326, 400 P 2d 888.

Date of Accrual

Indemnity benefits accrue from the date the permanent nature of the disability becomes established. Jones v. Claridge, 145 M 326, 400 P 2d 888.

Partial Loss of Member

Award of 500 weeks' compensation for double vision in one eye was excessive in view of provision in this section allowing only 140 weeks' compensation for total blindness in one eye. Johnson v. Industrial Accident Board, 157 M 221, 483 P 2d 918.

92-709A. Repealed.**Repeal**

Section 92-709A (Sec. 1, Ch. 190, L. 1951; Sec. 195, Ch. 147, L. 1963), relating

to compensation for second injuries, was repealed by Sec. 2, Ch. 254, Laws 1973. For new law, see sec. 92-709.1.

92-709.1. Subsequent injury provisions — fund — procedures. (1) As used in this act:

(a) "Vocationally handicapped" means a person who has a medically certifiable permanent physical impairment which is a substantial obstacle to obtaining employment or to obtaining reemployment if employee should become unemployed considering such factors as the person's age, education, training, experience, and employment rejection.

(b) "Certifying agency" means the section of rehabilitation, division of workmen's compensation.

(c) "Certificate" means documentation issued by the certifying agency to an individual who is vocationally handicapped.

(d) "Fund" means the subsequent injury fund.

(2) A person who wishes to be certified as vocationally handicapped for purposes of this section may apply to the certifying agency on forms furnished by that agency. The certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally handicapped certification.

(3) Upon commencement of employment or retention in employment of a certified vocationally handicapped person, the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency. The certifying agency shall acknowledge receipt of the information. Failure to file the required information with the certifying agency within sixty (60) days after the first day of the vocationally handicapped person's employment or retention in employment, precludes the employer from the protection and benefits of this section unless the information is filed before an injury for which benefits are payable under this section.

(4) The administrator of the division shall promulgate rules for certification of vocationally handicapped persons.

(5) A person certified as vocationally handicapped who receives a personal injury arising out of and in the course of his employment and re-

sulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his beneficiaries or dependents. The liability of the employer for payment of compensation, for furnished medical care and burial as provided in this act shall be limited to those benefits occurring during the period of one hundred four (104) weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and burial shall be the liability of the fund.

(6) When a vocationally handicapped person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this section, except where specifically otherwise provided herein. Not less than ninety (90) nor more than one hundred fifty (150) days before the expiration of one hundred four (104) weeks after the date of injury, the employer, carrier, or the industrial insurance fund, as the case may be, shall notify the fund whether it is likely that compensation may be payable beyond a period of one hundred four (104) weeks after the date of the injury. The fund, thereafter, may review, at reasonable times, such information as the employer, carrier or industrial insurance fund as regarding the accident, and the nature and extent of the injury and disability.

(7) If the fund does not notify the carrier of its intent to dispute the payment of compensation, medical and burial benefits, the employer, carrier, or industrial insurance fund, shall continue to make payments on behalf of the fund, and shall be reimbursed by the fund for all benefits paid that pertain to the period beyond one hundred four (104) weeks after the date of the injury. However, at any time subsequent to one hundred four (104) weeks after the date of injury, the fund may notify the carrier of a dispute as to payment of benefits. The liability of the fund to reimburse the employer, carrier, or the industrial insurance fund shall be suspended thirty (30) days thereafter until the controversy is determined.

(8) The obligation imposed by this section on the employer, carrier, or industrial insurance fund to make payments on behalf of the fund does not impose an independent liability on the employer, carrier or industrial insurance fund. After the right to reimbursement has been established, reimbursement payment shall be made promptly on a proper showing every six (6) months. If the employer, carrier or the industrial insurance fund does not make the payments on behalf of the fund, the fund may make the payments directly to the persons entitled to the payments.

(9) If an employee was employed or retained in employment under the provisions of this act and a dispute or controversy arises as to payment of benefits or the liability therefor, the division shall hold a hearing and resolve all disputes. On motion made in writing by the employer, carrier, or industrial insurance fund, the administrator shall join the fund as a party defendant.

(10) The division within five (5) days of the entry of an order joining the fund as a party defendant shall give the fund written notice thereof not less than twenty (20) days before the date of hearing and shall in-

clude the name of employee, employer, and the date of the alleged injury or disability. The fund, named as a defendant, shall have ten (10) days after the date of notification to file objections to being named as party defendant. On the date of the hearing at which the liability of the parties is determined, the hearing examiner first shall hear arguments and take evidence concerning the joinder as party defendant. If the fund has filed timely objection, and if argument and evidence warrant, the hearing examiner shall grant a motion to dismiss.

(11) At the time of the hearing, the employer and fund may appear, cross-examine witnesses, give evidence and defend both on the issue of liability of the employer to the employee and on issue of the liability of the fund.

(12) The hearing examiner shall make findings of fact and conclusions of law determining the respective liability of the employer and the fund.

(13) Benefits payable from the fund may be converted into a lump sum payment only upon a substantial showing for an equitable cause, the advisability of the lump sum payment to be determined and approved by the administrator of the division.

(a) In every case of the death of an employee under this act, the insurer shall pay to the fund the sum of one thousand dollars (\$1,000). In addition, the division may assess every insurer an amount not to exceed five per cent (5%) of the compensation paid in Montana in the preceding fiscal year. The assessment shall be transmitted annually to the subsequent injury fund by the employer or insurer.

(b) When in judgment of the administrator the amount of money in the subsequent injury fund is such that there is a surplus above and beyond projected liabilities, the administrator may at his discretion suspend or reduce further collection of assessments for a period of time determined by the administrator.

History: En. 92-709.1 by Sec. 1, Ch. 254, L. 1973.

Title of Act

An act providing for a subsequent injury fund in the Workmen's Compensation Act; and repealing section 92-709A, R. C. M. 1947.

Repealing Clause

Section 2 of Ch. 254, Laws 1973 read "Section 92-709A, R. C. M. 1947, is repealed, and the assets and liabilities acquired under this section are hereby transferred to the subsequent injury fund."

92-710. Occupational deafness. Regardless of other definitions of injury and time limitations imposed by this act, there shall be compensation awarded for occupational deafness as follows:

(1) "Occupational deafness" means permanent partial or permanent total loss of hearing of one or both ears due to prolonged exposure to noise in employment. "Noise" means sound capable of producing occupational deafness. "Noisy employment" means employment in the performance of which an employee is subjected to noise.

(a) Losses of hearing due to industrial noise for compensation purposes shall be confined to the frequencies of 500, 1000 and 2000 cycles per

second. Loss of hearing ability for frequency tones above 2000 cycles per second is not to be considered as constituting disability for hearing.

(b) The per cent of hearing loss, for purposes of the determination of compensation claims for occupational deafness, shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1000 and 2000 cycles per second. Pure tone air conduction audiometric instruments, approved by nationally recognized authorities in this field, shall be used for measuring hearing loss. If the losses of hearing average 25 decibels or less in the three frequencies, as measured under ISO Standard 1964, such losses of hearing shall not then constitute any compensable hearing disability. If the losses of hearing average 92 decibels or more in the three frequencies, as measured under ISO Standard 1964, then the same shall constitute and be total or 100 per cent compensable hearing loss.

(c) In measuring hearing impairment the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. For every decibel of loss exceeding 25 decibels an allowance of one and one-half per cent ($1\frac{1}{2}\%$) shall be made up to the maximum of one hundred per cent (100%), which is reached at 92 decibels.

(d) In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five (5). The resulting figure shall be added to the percentage of impairment in the poorer ear and the sum of the two divided by six (6). The final percentage shall be representative of the binaural hearing impairment.

(e) Before determining the percentage of hearing impairment, in order to allow for the average amount of hearing loss from nonoccupational causes found in the population at any given age, there shall be deducted from the total average decibel loss, one-half decibel for each year of the employee's age over forty at the time of last exposure to industrial noise.

(f) No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid.

(2) No benefits shall be payable for temporary total or temporary partial disability under this act for loss of hearing due to prolonged exposure to noise.

(3) An employee who because of occupational deafness is transferred by his employer to other employment and thereby sustains actual wage loss, shall be compensated at the rate provided in section 92-703.1, not exceeding three thousand five hundred dollars (\$3,500) in the aggregate from all employers. "Time of injury," "incurred such injury," "date of injury" in such case shall be the date of wage loss.

(4) Subject to the limitations herein contained, there shall be payable for total occupational deafness of one ear, forty (40) weeks of compensation; for total occupational deafness of both ears, two hundred (200) weeks of compensation; and for partial occupational deafness,

compensation shall bear such relation to that named herein as disabilities bear to the maximum disabilities herein provided.

In cases covered by this subsection, "time of injury," "incurred such injury" or "date of injury" shall be exclusively the date of occurrence of any of the following events to an employee:

(a) Transfer because of occupational deafness to nonnoisy employment by an employer whose employment has caused occupational deafness;

(b) Retirement;

(c) Termination of the employer-employee relationship;

(d) Layoff, provided the layoff is complete and continuous for one year;

(e) No claim under this subsection shall be filed, however, until six (6) consecutive months of removal from noisy employment after the time of injury except that under subparagraph (d), such six (6) consecutive months period may commence within the last six (6) months of layoff.

(5) The limitation provisions in this act shall control claims arising under this subsection. Such provisions shall run from the first date upon which claim may be filed, or from the date of subsequent death, provided that no claim shall accrue to any dependent unless an award has been issued or liability admitted.

(6) No payment shall be made to an employee under this section unless he shall have worked in noisy employment for a total period of at least ninety (90) days for the employer from whom he claims compensation.

(7) Any amount paid to an employee under this section by an employer shall be credited against compensation payable by any employer to such employee for occupational deafness under subsections (3) and (4). No employee shall in the aggregate receive greater compensation from any or all employers for occupational deafness than that provided in this section for total occupational deafness.

(8) Occupational deafness as herein provided is distinguished from traumatic loss of hearing which is governed by the specific loss schedule hereinabove.

(9) An employer shall become liable for the entire occupational deafness to which his employment has contributed; but if previous deafness is established by hearing test or other competent evidence, whether or not the employee was exposed to noise within the six (6) months preceding such test, he shall not be liable for previous loss so established nor shall he be liable for any loss for which compensation has previously been paid or awarded.

(10) No claim shall be filed, however, unless the employee is exposed eight (8) hours daily and for a period of at least ninety (90) days as above required to noise intensity levels above 90 decibels.

(11) This act shall become effective January 1, 1974.

History: En. 92-710 by Sec. 1, Ch. 366, L. 1971; amd. Sec. 1, Ch. 381, L. 1973.

Compiler's Notes

Section 1 of Ch. 366, Laws of 1971, enacted the section and assigned the section number in lieu of former section 92-710 R. C. M. 1947.

Title of Act

An act to provide compensation for loss of hearing resulting from exposure to industrial noise.

Amendments

The 1973 amendment reduced the hear-

ing loss specified in the third sentence of subdivision (1) (b) from 26 to 25 decibels; reduced the hearing loss specified in the fourth sentence of subdivision (1) (b) and at the end of subdivision (1) (c) from 94 to 92 decibels; increased the hearing loss specified near the beginning of the second sentence of subdivision (1) (c) from 24 to 25 decibels; changed the statutory reference in subdivision (3) from 92-703 to 92-703.1; reduced the noise intensity level specified at the end of subdivision (10) from 100 to 90 decibels; changed the date specified in subdivision (11) from January 1, 1972 to January 1, 1974; and made changes in style.

92-715. (2926) Biweekly payments converted into a lump sum.

Discretion of Board

Board had discretion to order lump-sum payment of award for permanent and total disability in light of medical testimony that disability was partly psychosomatic and chance of rehabilitation would be improved by complete settlement. *Legowik v. Montgomery Ward & Co.*, 157 M 436, 486 P 2d 867.

Industrial accident board did not abuse discretion by denying lump-sum settlement where claimant had no pressing need and his only concerns were to pay attorney's fees expended in pressing claim and to put the lump-sum payment "on interest." *Kent v. Sievert*, 158 M 79, 489 P 2d 104.

CHAPTER 8—MISCELLANEOUS REGULATIONS—POWERS OF BOARD—REHEARINGS AND APPEALS

Section 92-827. Record of proceedings to be kept and testimony to be taken down—attorney's fees—transcripts on appeal—indigent claimants.

92-834. How appeal taken—notice—record—trial.

92-807. (2933) Notice of claims for injuries other than death.

References

La Forest v. Safeway Stores, Inc., 147 M 431, 414 P 2d 200.

92-808. (2934) Employers and insurers required to file reports, etc.

Failure to File

Where employee was injured while performing work assigned to him under contract between his employer and second company, failure of second company to file timely injury report with industrial

accident board prevented it from invoking exclusive jurisdiction in board as "exclusive remedy" after employee filed civil suit in district court. *State ex rel. Broesder v. Industrial Accident Board*, 154 M 178, 461 P 2d 456.

92-810. (2936) Repealed.

Repeal

Section 92-810 (Sec. 17, Ch. 96, L.

1915), relating to mortality tables, was repealed by Sec. 1, Ch. 106, Laws 1973.

92-821. (2947) Jurisdiction of board to hear disputes and controversies.

Fraudulent Claim

Award of lump-sum settlement based on a petition forged by employer's claims manager did not determine injured employee's right to lump-sum settlement,

and employee had no cause of action against the employer arising out of claims manager's subsequent forgery and conversion of the lump-sum check. *Lewis v. Anaconda Co.*, — M —, 503 P 2d 535.

References
 State ex rel. Glacier General Assurance Co. v. District Court, 143 M 569, 393 P 2d 54.

92-825. (2951) When a nominal disability indemnity may be awarded.

Degree of Permanent Physical Impairment Unknown

Where the board found that a compensable impairment existed, but the degree of permanent physical impairment was un-

known, it was proper to award nominal disability indemnity under this section. *Benoit v. Murphy Corp.*, 143 M 463, 391 P 2d 350.

92-826. (2952) Jurisdiction to rescind or amend any order, etc.

Compromise Settlement

Where employee sought, agreed to and accepted a full and final compromise settlement of his compensation claim, board was precluded under this section

from reconsidering his claim. *State ex rel. Montana Phosphate Products Co. v. Industrial Accident Board*, 156 M 466, 481 P 2d 684.

92-827. (2953) Record of proceedings to be kept and testimony to be taken down—attorney's fees—transcripts on appeal—indigent claimants. A full and complete record shall be kept of all proceedings and hearings had before the board, or any member thereof, of any formal hearing had, and all testimony produced before the board or any member thereof shall be taken down by a stenographic reporter appointed by the board, and the parties shall be entitled to be heard in person or by attorney.

Whenever the claimant or plaintiff is represented by an attorney either before the board or the courts, the industrial accident board may, in its discretion or upon the application of the claimant or plaintiff, fix the amount of the attorney fee of the attorney representing the claimant or plaintiff, and the fee fixed by the board shall be paid by claimant or plaintiff.

In cases of an action to review any order or decision of the board, a transcript of such testimony, together with all exhibits, and of the pleadings, records, and proceedings in the cause shall constitute the record of the board. Provided further, that the board must furnish a copy of such testimony, written exhibits, pleadings, records and proceedings to the claimant without cost.

After judgment on appeal to the district court, an indigent claimant, deeming himself aggrieved, may file in said court an affidavit that he does not have money, property or credit sufficient to pay for the cost of a transcript on appeal to the supreme court, and the clerk of court serve a copy by registered mail, return receipt requested, on the industrial accident board; the affidavit shall be prima facie evidence of the truth of the facts stated therein; in the event the board contest the allegations, the court shall fix a date for the hearing thereof, not less than five nor more than ten days from date of filing, and shall make its determination of the controversy, and if it be found and adjudged that the claimant does not have sufficient money, property or credit to pay for such transcript, the order shall direct the industrial accident board to furnish the same at its expense to be paid from the industrial accident administrative earmarked revenue account.

All proceedings on such appeal, including preparation, presentation and settlement of the bill of exceptions, shall be continued pending determination of the controversy.

If the board does not contest the allegations of the claimant's affidavit within ten days from receipt, it shall be deemed in default and the court shall make its order in favor of claimant on expiration of such period.

History: En. Sec. 20, Ch. 96, L. 1915; re-en. Sec. 2953, R. C. M. 1921; amd. Sec. 4, Ch. 139, L. 1931; amd. Sec. 3, Ch. 162, L. 1937; amd. Sec. 1, Ch. 170, L. 1959; amd. Sec. 1, Ch. 111, L. 1965.

Amendment

The 1965 amendment added the fourth, fifth and sixth paragraphs.

Repealing Clause

Section 2 of Ch. 111, Laws 1965 re-

pealed all acts and parts of acts in conflict therewith.

Attorney's Fees

Attorney who charged fees in excess of amount ordered by industrial accident board pursuant to this section was properly subject to discipline by public censure. In re Porter, 156 M 190, 478 P 2d 866.

92-829. (2955) Application for rehearing.

Court Required to Make Findings of Fact and Conclusions of Law

While there is no rule of law requiring the district court to adopt the proposed findings and conclusions of either litigant on appeal in a workmen's compensation case, and the court may request that the litigants submit such findings, or litigants may submit them without a request by the

court, it is clear that the legislature intended that the court make findings of fact and conclusions of law in all cases on appeal. Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

References

Simons v. C. G. Bennett Lumber Co., 146 M 129, 404 P 2d 505.

92-830. (2956) Board may at any time diminish or increase an award.

References

State ex rel. Glacier General Assurance

Co. v. District Court, 143 M 569, 393 P 2d 54.

92-832. (2958) Application for rehearing or appeal, etc.

Payment Pending Appeal

Payment of benefits by insurance carrier in accordance with order of industrial accident board did not render appeal from such order moot and subject to dismissal, since under this section order of board

must be carried out by carrier unless it makes application for stay, in view of fact that receipt for payment stated that it was "subject to claimant's appellate rights." Bigar v. Tri-State Sand & Gravel, Inc., 157 M 459, 486 P 2d 881.

92-833. (2959) Appeal to district court.

Jurisdiction of District Court

District court had no jurisdiction to hear claimant's appeal from the decision of the industrial accident board when the court's seat was in neither the county of the em-

ployer's residence nor the county of the place of the accident. State ex rel. Glacier General Assurance Co. v. District Court, 143 M 569, 393 P 2d 54.

92-834. (2960) How appeal taken—notice—record—trial. Said appeal shall be taken by serving a written notice of said appeal upon the chairman of such industrial accident commission, or upon any other member thereof, which said service shall be made by the delivery of a copy of such notice to such chairman or member, and filing the original with the clerk of the court to which said appeal is taken. A copy of such notice must also be

served upon the adversary party, if there be any, by mailing the same to said adversary party to such address of such party as said party shall have left with the board. If such party shall have left no address with the board, then no service upon such party shall be required. The order of filing and service of said notice is immaterial. Immediately upon service upon said board of said notice, the said board shall certify to said district court the entire record and proceedings, including all testimony and evidence taken by said board, with the clerk of said district court. Immediately upon the return of such certified record, the district court shall fix a day for the hearing of said cause, and shall cause notice to be served upon the board and upon the appellant, and also upon the adversary party, if there be any. The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard on the record of the board, as certified to the court by it. The trial of the matter shall be de novo, and upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case.

History: En. Sec. 22, Ch. 96, L. 1915; re-en. Sec. 2960, R. C. M. 1921; amd. Sec. 7, Ch. 149, L. 1965.

Amendment

The 1965 amendment made no apparent change.

Repealing Clause

Section 8 of Ch. 149, Laws 1965 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 9 of Ch. 149, Laws 1965 read "This act shall be in full force and effect from and after the 1st day of July, 1965."

Additional Evidence

Where a final decision to stop payments under workmen's compensation had been made by the industrial accident board, testimony of claimant's personal physician as to his examination of her more than six

years earlier was relevant and should have been reconsidered by the board, "good cause" thus having been shown. *Johnson v. Industrial Accident Board*, 157 M 221, 483 P 2d 918.

Court Required to Make Findings of Fact and Conclusions of Law

While there is no rule of law requiring the district court to adopt the proposed findings and conclusions of either litigant on appeal in a workmen's compensation case, and the court may request that the litigants submit such findings, or litigants may submit them without a request by the court, it is clear that the legislature intended that the court make findings of fact and conclusions of law in all cases on appeal. *Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698.

References

Simons v. C. G. Bennett Lumber Co., 146 M 129, 404 P 2d 505.

92-835. (2961) Appearances—setting aside conclusions, orders, etc.

References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

92-838. (2964) Court to give liberal construction to act.

Failure to List Children in Claim

Where claimant failed to list all of his children in his claim for compensation it did not constitute a waiver of the claim. *Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698.

Wages at Time of Injury

Notwithstanding this section's directive to construe provisions of Compensation Act liberally, court found no room for interpretation of words "wages received at the time of the injury" in former section

92-703. Olson v. Manion's Inc., — M —,
510 P 2d 6, 9.

References

State ex rel. Glacier General Assurance
Co. v. District Court, 143 M 569, 393 P 2d
54.

CHAPTER 9—COMPENSATION PLAN NO. 1

Section 92-901. When and how employer may elect to adopt—direct payment to employee.

92-902. Proof of solvency of employer electing plan No. 1 to be filed—payroll assessments.

92-901. (2970) When and how employer may elect to adopt—direct payment to employee.

COMPENSATION PLAN NUMBER ONE

An employer may elect to be bound by compensation plan No. 1, upon furnishing satisfactory proof to the division of his solvency and financial ability to pay the compensation and benefits in this act provided for, and to discharge all liabilities which are reasonably likely to be incurred by him during the fiscal year for which such election is effective, may, by order of the division, make such payments directly to his employees as they may become entitled to receive the same under the terms and conditions of this act.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2970, R. C. M. 1921; amd.
Sec. 2, Ch. 443, L. 1973.

Amendments

The 1973 amendment deleted "in the

industries, trades, works, occupations, or employments in this act specified as hazardous," following "employer" at the beginning of the section; substituted "division" for "board" in two places; and made minor changes in phraseology.

92-902. (2971) Proof of solvency of employer electing plan No. 1 to be filed—payroll assessments. Every employer who has elected to be bound by compensation plan No. 1, shall file proof of his solvency within the time and in the form as may be prescribed by the rules or orders of the division.

The division may levy an assessment in an amount not to exceed three-hundredths of one per cent (.03%) of the annual payroll of such employer in Montana, for the preceding fiscal year, which assessment shall be paid to the division by the employer at the time of filing of proof of solvency.

No assessment shall be in an amount less than two hundred dollars (\$200).

If the employer had no payroll in Montana for the entire preceding fiscal year, the assessment shall be based on the estimated payroll for the year in which election is made.

The division shall pay the amounts so collected into the state treasury.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2971, R. C. M. 1921; amd. Sec.
5, Ch. 139, L. 1931; amd. Sec. 3, Ch. 176,
L. 1957; amd. Sec. 169, Ch. 147, L. 1963;
amd. Sec. 1, Ch. 183, L. 1965; amd. Sec.
1, Ch. 170, L. 1969; amd. Sec. 1, Ch. 143,
L. 1971; amd. Sec. 3, Ch. 443, L. 1973.

Amendments

The 1965 amendment increased the minimum assessment specified in the third paragraph from \$10 to \$75.

The 1969 amendment increased the minimum assessment specified in the third paragraph from \$75 to \$200.

The 1971 amendment substituted "may" for "shall" before "levy an assessment" in the second paragraph; increased the maximum assessment rates specified in the second paragraph from two hundredths to three hundredths of one per cent; and made minor changes in phraseology.

The 1973 amendment deleted "now or hereafter engaged in the state of Montana, in the industries, trades, works, occupations, or employments herein mentioned"

after "employer" near the beginning of the section; substituted "division" for "board" in three places and for "treasurer of the board" in the final paragraph; and made minor changes in phraseology.

Repealing Clause

Section 2 of Ch. 183, Laws 1965 repealed all acts and parts of acts in conflict therewith.

CHAPTER 10—COMPENSATION PLAN NO. 2

- Section 92-1004. Agreement to be contained in policies of insurance—deposit of bonds.
92-1005. Policies made subject to this act—assessment of insurers.

92-1002. (2979) Duty of employer electing plan No. 2, etc.

References

Meyer v. Noble Drilling, Inc., 259 F Supp 110, 115.

92-1004. (2981) Agreement to be contained in policies of insurance—deposit of bonds. No such policy shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation all the installments of compensation or other payments in this act provided for, and that the obligation shall not be affected by any default of the insured after the injury, or by any default in the giving of any notice required by such policy or by this act or otherwise. Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation. Before issuance of any policy by an insurer as herein authorized, such insurer must deposit with the treasurer of the industrial accident board, bonds of the United States or the state of Montana, or of any school district, county, city or town in the state of Montana, or a corporate surety bond made out to and approved by the board, in an amount not less than five thousand dollars (\$5,000.00) or more than one hundred thousand dollars (\$100,000), as the industrial accident board may determine. If any insurer shall fail to discharge any liability after the amount thereof shall be determined by the board, and within the time limited by the board, it shall be the duty of the board to convert said bonds, or such part thereof as is necessary, into cash, and from the proceeds liquidate such liability; and thereafter said insurer must make an additional deposit to meet any deficiency caused thereby. It is intended hereby to give the industrial accident board the discretion in the matter of whether an insurer has failed to discharge any liability.

History: En. Sec. 35, Ch. 96, L. 1915; amd. Sec. 10, Ch. 100, L. 1919; re-en. Sec. 2981, R. C. M. 1921; amd. Sec. 11, Ch. 177, L. 1929; amd. Sec. 1, Ch. 141, L. 1971.

third sentence; and increased the maximum deposit under the third sentence from \$20,000 to \$100,000.

Cross-References

Policy to provide for freedom of choice of professional practitioner, sec. 40-4108.

Amendments

The 1971 amendment inserted the clause relating to corporate surety bonds in the

92-1005. (2982) Policies made subject to this act—assessment of insurers. Every policy for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act. No insurer shall enter into any such policy of insurance unless its forms shall have been approved by the board, and as otherwise provided by law.

On or before the first day of July of each year, the board shall assess and each insurer shall pay to the board not to exceed three and one-fourths per cent ($3\frac{1}{4}\%$) of its gross annual direct premiums collected in Montana on policies of insurance insuring employers who elected to become bound by the compensation plan No. 2 during the previous calendar year, less return premiums. No such assessment shall be less than two hundred dollars (\$200). The treasurer of the board shall pay the amounts so collected into the state treasury. Payments by such insurers under this section shall be considered as items of loss for rate-making purposes.

History: En. Sec. 35, Ch. 96, L. 1915; re-en. Sec. 2982, R. C. M. 1921; amd. Sec. 1, Ch. 217, L. 1951; amd. Sec. 5, Ch. 176, L. 1957; amd. Sec. 1, Ch. 203, L. 1959; amd. Sec. 170, Ch. 147, L. 1963; amd. Sec. 1, Ch. 142, L. 1971.

Amendments

The 1971 amendment increased the minimum assessment specified in the second sentence of the second paragraph from \$10 to \$200.

CHAPTER 11—COMPENSATION PLAN NO. 3

- Section 92-1101. What necessary in electing plan No. 3—percentage of payroll to be paid under plan.
 92-1102. Permitting employers to elect to comply and come under the provisions of this act.
 92-1103. Manner of electing—contract or policy of insurance—payment of premium.
 92-1104. Classifications by board.
 92-1105. Intent and purpose of plan No. 3.
 92-1105.1. Advanced rate for dangerous places of employment.
 92-1108. In case of default, rates to be advanced twenty-five per cent (25%).
 92-1121. What included in computing compensation in employment.

92-1101. (2990) What necessary in electing plan No. 3—percentage of payroll to be paid under plan.

COMPENSATION PLAN NUMBER THREE

Every employer subject to the provisions of compensation plan No. 3 shall at the times and in the manner prescribed by the industrial accident board, pay to the industrial accident board a premium based on a percentage of his payroll as determined by the industrial accident board which shall be a member of a rating organization in accordance with the provisions of this act.

History: En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2990, R. C. M. 1921; amd. Sec. 1, Ch. 123, L. 1957; amd. Sec. 175, Ch. 147, L. 1963; amd. Sec. 1, Ch. 233, L. 1969; amd. Sec. 20, Ch. 329, L. 1969.

Compiler's Notes

This section was amended twice in 1969, once by Ch. 233 and once by Ch. 329. Neither amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to conflict, the compiler has made

a composite section incorporating both amendments.

Amendments

Chapter 233, Laws of 1969, substituted "at the times and in the manner pre-

scribed by the industrial accident board" for "in the manner herein specified."

Chapter 329, Laws of 1969, inserted "which shall be a member of a rating organization."

92-1102. (2990.1) Permitting employers to elect to comply and come under the provisions of this act. An employer shall comply with the provisions of this act, in which event he will not be liable to respond in damages at common law or by statute for injury or death of an employee and shall enjoy the benefits and privileges of this act. The employee of the employer is considered to come under the provisions of this act unless the employee executes and files with the division on proper forms to be furnished for that purpose, a specific election not to be so bound, in which event he shall not enjoy the benefits or privileges of this act until the election is withdrawn.

History: En. Sec. 17, Ch. 121, L. 1925; amd. Sec. 177, Ch. 147, L. 1963; amd. Sec. 4, Ch. 443, L. 1973.

Amendments

The 1973 amendment deleted "engaged in farming, dairying, agriculture, viticulture, horticulture, stock or poultry raising," following "employer" at the beginning of the first sentence; substituted "shall comply with the provisions of this

act" in the first sentence for "may elect to comply with the provisions of plan 2 or 3 of this act and pay the premiums provided in the act"; deleted "during the period covered by such premiums" following "death of an employee" near the end of the first sentence; substituted "division" for "board" in the second sentence; deleted the last sentence of the former section; and made minor changes in style and phraseology.

92-1103. (2991) Manner of electing—contract or policy of insurance—payment of premium. The industrial accident board shall prescribe the procedure by which employers may elect to be bound by compensation plan No. 3, the effective time of such election and the manner in which such election is terminated for reasons other than default in payment of premiums. Every employer electing to be bound by compensation plan No. 3 shall receive from the industrial accident board a contract or policy of insurance in a form approved by the board. The premium thereon shall be paid by the employer, to the industrial accident board at such times as the board shall prescribe and shall be paid over by the board to the state treasurer to the credit of the industrial insurance account in the agency fund.

History: En. Sec. 40, Ch. 96, L. 1915; amd. Sec. 6, Ch. 196, L. 1921; re-en. Sec. 2991, R. C. M. 1921; amd. Sec. 2, Ch. 123, L. 1957; amd. Sec. 178, Ch. 147, L. 1963; amd. Sec. 2, Ch. 233, L. 1969.

Repealing Clause

Section 3 of Ch. 233, Laws 1969 read "Sections 92-1106 and 92-1107, R. C. M. 1947, are repealed."

Cross-References

Policy to provide for freedom of choice of professional practitioner, sec. 40-4108.

Amendments

The 1969 amendment inserted the present first sentence.

92-1104. (2992) Classifications by board. The industrial accident board is hereby given full power and authority to determine premium rates and classifications as in its judgment and experience, and as a member of a rating organization as is otherwise provided for in this code,

may be necessary or expedient, provided that no change in the classification or rates prescribed shall be effective until thirty (30) days after the date of the order making such change.

History: En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2992, R. C. M. 1921; amd. Sec. 3, Ch. 123, L. 1957; amd. Sec. 21, Ch. 329, L. 1969.

a member of a rating organization as is otherwise provided for in this code."

Cross-References

Industrial accident board to be member of rating organization, sec. 40-5616.

Amendments

The 1969 amendment inserted "and as

92-1105. (2993) Intent and purpose of plan No. 3. It is the intent and purpose of compensation plan No. 3 that each industry, trade, occupation or employment coming under the provisions of said plan shall be liable to pay for injuries happening to employees coming under the provisions of the Workmen's Compensation Act.

All premiums, penalties, recoveries by subrogation, interest earned upon money belonging to the fund, and securities acquired by or through use of money shall be deposited in the industrial insurance account in the agency fund.

The industrial insurance program shall be neither more nor less than self-supporting. Employments affected by the provisions hereof shall be divided by the board as a member of a rating organization into classes, whose rates may be readjusted at such times as the board as a member of such rating organization may determine. Separate accounts shall be kept of the amounts collected and expended in each class for determining rates but for payment of compensation and dividends the industrial insurance account shall be one and indivisible. The board as a member of such rating organization shall determine the hazards of the different classes of occupations or industries and fix the premiums therefor at the lowest rate consistent with maintenance of a solvent industrial insurance fund, and the creation of surplus and reserves and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each risk, and shall take advantage of the experience and information afforded to it as a member of such rating organization.

The board in fixing rates shall provide for the expenses of administering the industrial insurance account allowed by law, the disbursements on account of injuries and deaths of employees in each class, an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, and such other reserves and surplus as may be determined by the board as a member of such rating organization.

History: En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2993, R. C. M. 1921; amd. Sec. 4, Ch. 123, L. 1957; amd. Sec. 176, Ch. 147, L. 1963; amd. Sec. 22, Ch. 329, L. 1969.

after "board"; inserted "as a member of such rating organization" after "board" in the second and fourth sentences, and added "and shall take advantage * * * rating organization" to the fourth sentence; and, in the fourth paragraph, added "as a member of such rating organization."

Amendments

The 1969 amendment, in the second sentence of the third paragraph, inserted "as a member of a rating organization"

Separability Clause

Section 23 of Ch. 329, Laws 1969 read

"The provisions of this act shall be severable; and if any of its sections, provisions, exceptions, sentences, clauses,

phrases or parts be held unconstitutional or void, the remainder of this act shall continue in full force and effect."

92-1105.1. Advanced rate for dangerous places of employment. If by reason of poor or careless management, or otherwise, any place of employment be unduly dangerous in comparison with other like places of employment, and the employer operating the same shall not have complied with the safety provisions of the Montana Safety Act, and such employer shall be under compensation plan number 3, the board, in addition to any other penalty provided, shall advance the rate upon such place of employment fifty (50) per cent, and such advanced rate shall continue and be in force until such place of employment shall have ceased to be unduly dangerous in comparison with other like places of employment and such employer shall have obtained a certificate of the board.

History: En. 92.1105.1 by Sec. 28, Ch. 341, L. 1969.

92-1106, 92-1107. (2994, 2995) Repealed.

Repeal

Sections 92-1106 and 92-1107 (Sec. 40, Ch. 96, L. 1915; Sec. 179, Ch. 147, L.

1963), relating to payments under compensation plan No. 3, were repealed by Sec. 3, Ch. 233, Laws 1969.

92-1108. (2996) In case of default, rates to be advanced twenty-five per cent (25%). Any employer who is in default in the observance of any order of the board, issued pursuant to the provisions of sections 92-1101 to 92-1105, inclusive, shall, in addition to any other penalty provided by this act, be charged an advance of twenty-five per centum (25%) over the established rate, and such advanced rate shall continue and be in force until such employer shall have ceased to be in such default.

History: En. Sec. 40, Ch. 96, L. 1915;

re-en. Sec. 2996, R. C. M. 1921; amd. Sec. 4, Ch. 233, L. 1969.

Amendments

The 1969 amendment substituted section "92-1105" for "92-1107."

92-1121. (3009) What included in computing compensation in employment. In computing the payroll, the entire compensation received by every workman employed under this act, shall be included, whether it be in the form of salary, wage, piecework, or otherwise, and whether payable in money, board or otherwise.

History: En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 3009, R. C. M. 1921; amd. Sec. 11, Ch. 235, L. 1947; amd. Sec. 1, Ch. 146, L. 1971; amd. Sec. 5, Ch. 443, L. 1973.

The 1973 amendment substituted "under this act" for "in the hazardous occupations enumerated in this act."

Repealing Clause

Amendments
The 1971 amendment deleted a second sentence reading "Salary and wages paid during actual vacation period shall not be computed or assessed."

Section 6 of Ch. 443, Laws 1973 read "Sections 92-301 through 92-306 and 92-402 through 92-407, R. C. M. 1947, are repealed."

CHAPTER 12—SAFETY PROVISIONS

(Repealed—Sections 6 to 8, Chapter 176, Laws of 1957; Section 30, Chapter 341, Laws of 1969)

92-1201 to 92-1210. (3012 to 3021) Repealed.

Repeal

Sections 92-1201 to 92-1210 (Secs. 50, 51, Ch. 96, L. 1915), relating to safety provisions, were repealed by Sec. 30, Ch. 341, Laws 1969.

92-1214 to 92-1222. (3025 to 3033) Repealed.

Repeal

Sections 92-1214 to 92-1222 (Secs. 53, 54, Ch. 96, L. 1915), relating to safety provisions, were repealed by Sec. 30, Ch. 341, Laws 1969.

CHAPTER 13—OCCUPATIONAL DISEASE ACT

Section 92-1303. Definitions.

92-1304. Occupational disease.

92-1305. Proximate causation.

92-1310. Liability of last employer, exception.

92-1311. Payment of compensation—exceptions and limitations.

92-1312. Claims must be presented within what time.

92-1313. Notice of disability or death.

92-1315. Procedure for medical examination.

92-1315.1. Medical definition of totally disabling pneumoconiosis.

92-1321. Compensation benefits payable under this act.

92-1334. Compensation plans.

92-1303. Definitions. Except as in this section and elsewhere in this act expressly set forth, the definitions contained in the Workmen's Compensation Act shall apply to terms and words herein contained.

1. to 4. * * * [Same as parent volume.]

5. "Disablement" means the event of becoming physically incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit. "Silicosis," as defined in this act, when complicated by active pulmonary tuberculosis, shall be presumed to be total disablement. "Disability," "disabled," "total disability," or "totally disabled" shall be synonymous with "disablement," but they shall have no reference to "partial permanent disability." Provided that in the event of death or disability due to pneumoconiosis the following shall apply:

a. If a miner who is suffering or has suffered from pneumoconiosis was employed for ten (10) years or more in one (1) or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.

b. If a deceased miner was employed for ten (10) years or more in one (1) or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis.

c. If a miner is suffering or suffered from a chronic dust disease of the lung which (1) when diagnosed by chest roentgenogram yields one (1) or more large opacities (greater than one centimeter in diameter)

and would be classified in category A, B, or C in the international classification of radiographs of the pneumoconioses by the international labor organization, (2) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (3) when diagnosis is made by other means, would be a condition which would reasonably be expected to yield results described in clause (1) or (2) if diagnosis had been made in the manner prescribed in clause (1) or (2) then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, as the case may be.

6. to 25. * * * [Same as parent volume.]

26. For the purpose of this act "silicosis" is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide (SiO_2) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing characteristic X-ray pattern, and by variable clinical manifestations.

a. For the purpose of this act "pneumoconiosis" is defined as a chronic dust disease of the lung arising out of employment in coal mines, and includes anthracosis, coal workers' pneumoconiosis, silicosis, or anthracosilicosis arising out of such employment.

27. and 28. * * * [Same as parent volume.]

History: En. Sec. 3, Ch. 155, L. 1959;
amd. Sec. 1, Ch. 190, L. 1971.

Amendments

The 1971 amendment inserted the pro-

viso relating to pneumoconiosis, including paragraphs a through c, in subdivision 5; and inserted paragraph a defining pneumoconiosis in subdivision 26.

92-1304. Occupational disease. The term "occupational disease" shall mean all diseases arising out of or contracted from and in the course of employment.

History: En. Sec. 4, Ch. 155, L. 1959;
amd. Sec. 1, Ch. 95, L. 1965; amd. Sec. 1,
Ch. 41, L. 1971.

all acts and parts of acts in conflict therewith.

Amendments

The 1965 amendment added "asbestosis" to item 1.

The 1971 amendment completely rewrote this section. For prior text, see parent volume.

Repealing Clause

Section 2 of Ch. 95, Laws 1965 repealed

Hydrocarbon Inhalation

Evidence was insufficient to sustain automobile mechanic's allegation that his exposure to concentration of diesel smoke resulted in his contracting emphysema or aggravating a pre-existing emphysema condition because of hydrocarbon inhalation. *Aho v. Burkland Studs, Inc.*, 153 M 1, 452 P 2d 415.

92-1305. Proximate causation. Occupational diseases shall be deemed to arise out of the employment only if:

1. to 5. * * * [Same as parent volume.]

History: En. Sec. 5, Ch. 155, L. 1959;
amd. Sec. 1, Ch. 40, L. 1971.

Amendments

The 1971 amendment deleted from the introductory clause a reference to the preceding section.

92-1308. Right to compensation exclusive remedy.

Proof of Claim

Determination by industrial accident

board that workman was not entitled to benefits for silicosis was not an exclusion

of him from the act but was a finding he had not proved his claim; workman was not within class of employees "not eligible for compensation," as provided in section 92-1331, and could not sue employer for his alleged ailments. *Anaconda Co. v. District Court, Second Judicial Dist., Silver Bow County*, — M —, 506 P 2d 81.

92-1310. Liability of last employer, exception. Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazard of such disease, but in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (SiO_2) dust for a period of ninety (90) actual workshifts or more after July 1, 1958. Provided that in the case of pneumoconiosis any coal mine operator who has acquired a mine in the state or substantially all of the assets thereof, from a person who was an operator of such mine on or after December 30, 1969, is liable for, and must secure the payment of, all benefits which would have been payable by that person with respect to miners previously employed in such mine if acquisition had not occurred and that person had continued to operate such mine; and the prior operator of such mine shall not be relieved of any liability under this section.

History: En. Sec. 10, Ch. 155, L. 1959; amd. Sec. 2, Ch. 190, L. 1971.

Amendments

The 1971 amendment added the proviso relating to pneumoconiosis.

92-1311. Payment of compensation—exceptions and limitations. A. Compensation shall be paid to every employee who becomes disabled by reason of occupational disease arising out of his employment, subject to the following conditions; and when claims are presented and notices given in accordance with the limitations of sections 92-1312 and 92-1313.

1. * * * [Same as parent volume.]

2. No compensation shall be paid for a disease other than silicosis or due to ionizing radiation unless total disability results within one hundred twenty (120) days from the last day upon which the employee actually worked for the employer against whom compensation is claimed; provided that the board upon good cause shown may waive this limitation in the interest of justice, but in any case said period may not be extended to more than one year from the date of last employment by the said employer.

3 to 5. * * * [Same as parent volume.]

B. The compensation shall be paid to the beneficiary and dependents of every employee covered by this act in cases where death results from an occupational disease arising out of his employment subject to the following conditions.

1 to 3. * * * [Same as parent volume.]

4. No compensation shall be paid for death from any occupational disease other than silicosis or due to ionizing radiation unless death results within one (1) year from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous

total disability from an occupational disease other than silicosis or ionizing radiation for which compensation has been paid or awarded, or for which a claim, compensable but for such death, is on file with the board. In such cases compensation shall be paid if death results within three (3) years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

5. * * * [Same as parent volume.]

C. * * * [Same as parent volume.]

History: En. Sec. 11, Ch. 155, L. 1959; Amendment
amd. Sec. 1, Ch. 92, L. 1965.

The 1965 amendment inserted "or due to ionizing radiation" following "silicosis" in paragraphs A 2 and B 4.

92-1312. Claims must be presented within what time. The provisions of section 92-601 shall not apply to claims filed under this act.

It is hereby provided in the case of disability resulting from occupational diseases as herein defined, including silicosis, that all claims therefor shall be forever barred unless the same shall be presented in writing under oath to the employer, the insurer or the board as the case may be within thirty (30) days after claimant has filed his notice of disability as provided in section 92-1313. In the case of death from an occupational disease, as herein defined, including silicosis, all claims therefor shall be forever barred unless the same shall be presented in writing under oath to the employer, the insurer, or the board, as the case may be, within thirty (30) days of filing the notice of death as provided in section 92-1313. For the purpose of this act a claim for benefits on account of total disability or death of a miner due to pneumoconiosis is deemed to be timely filed if it is filed within three (3) years of the discovery of the total disability or the date of death.

Claims shall be filed in triplicate on forms to be furnished by the board and may be accompanied by a medical report of the claimant's attending physician. The provisions of this section as to the time for presenting claims for compensation shall prevail over any other provisions of this act to the contrary.

History: En. Sec. 12, Ch. 155, L. 1959; Amendments
amd. Sec. 3, Ch. 190, L. 1971.

The 1971 amendment added the last sentence, relating to pneumoconiosis claims, to the first paragraph.

92-1313. Notice of disability or death. The provisions of section 92-807 shall not apply to cases of disability or death from occupational diseases as in this act defined.

Notice of disability or death in respect to which compensation is payable under this act, except disability or death resulting from silicosis, shall be given to the employer, the insurer, or the board, as the case may be, within thirty (30) days after the employee, his beneficiaries, or his dependents knew or should have known the nature of the impairment or cause of death and its relationship to the employment, but in no event, except in the case of disability or death due to ionizing radiation, shall notice be filed more than one year after the last day upon which the

employee actually worked for the employer against whom compensation is claimed.

In cases of disability resulting from silicosis which are compensable under this act, notice of such disability shall be given to the employer, the insurer, or the board, as the case may be, within thirty (30) days after the employee knew or should have known of the nature of the impairment and its relationship to employment, but in no event shall such notice be filed more than four (4) years after the last date upon which the employee actually worked for the employer against whom compensation is claimed.

In cases of a death from silicosis which is compensable under this act, notice of such death shall be given to the employer, the insurer, or the board, within thirty (30) days after the employee's beneficiaries or his dependents knew or should have known of the cause of death and its relationship to the employment, but in no event shall such notice be filed more than one (1) year after such death.

Such notice shall be valid only if filed in writing on forms to be furnished by the board, and shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the disability or death, and shall be signed by the employee or by some other person on his behalf; or in case of death by any person claiming to be entitled to compensation for such death or by some person on his behalf.

Except if death occurs during the period of total disability described in section 92-1311, B.3., in which case the period of notice may be extended to the term of seven (7) years from the last day of said employment.

History: En. Sec. 13, Ch. 155, L. 1959;
amd. Sec. 2, Ch. 92, L. 1965.

Amendment

The 1965 amendment inserted "except in the case of disability or death due to ionizing radiation" in the second paragraph.

92-1315. Procedure for medical examination. A. In order to determine the validity of claims made pursuant to the provisions of this act, the following procedure and no other shall be followed in the course of the medical examination of the claimant for official report to said board, claimant, employer, or insurer, as the case may be.

1. Upon the filing of a claim by a claimant for occupational disease disability, other than silicosis or pneumoconiosis, the board shall direct a member from said "medical committee" to examine and determine the disability of the claimant and submit a written report thereon to the board.

Upon the filing of a claim for compensation for silicosis disability under this act, the board shall direct an examination of and report to the board upon the claimant by said "pulmonary specialists," or one of them, including such X-ray and other pathological examination and tests as in the opinion of such specialist or specialists may be necessary for the purpose of determining diagnosis, disablement, and the nature and type of medical treatment, hospitalization and other care required. If the claim

is not controverted as to any medical fact, the examination and report of one of said specialists, shall be deemed the examination and report of all "pulmonary specialists." If the claim is controverted as to any medical fact, the report shall be made by all of said specialists after a physical examination by at least two (2) of them. The findings and opinions of a majority of the number of said specialists then appointed shall constitute the findings and opinions of all of them. The contents of the report of said "pulmonary specialists" when placed in the record shall constitute prima facie evidence of fact as to the matter therein contained. The "pulmonary specialists" or any one (1) of them making the report shall be subject to examination upon demand of any interested parties.

The "pulmonary specialists," or any one (1) of them in order to assist in reaching a conclusion may require the attending physician or director of a hospital or a sanitarium or other place in which treatment or care is being given, or has been given, to attend at a convenient time and place to consult with said specialists, or any one of them and to describe the nature and type of care and treatment and furnish any other evidence which said specialist or specialists desire.

Upon receiving the written report of such examining physician or physicians so appointed, the board shall forthwith determine whether or not the claimant shall receive the benefits pursuant to this act and it shall forward notice of its determination together with a true and correct copy of said medical report to the claimant and the employer or insurer as the case may be.

2. * * * [Same as parent volume.]

B. The standards for determining death or total disability due to pneumoconiosis are as follows:

1. Total disability defined. A miner is under a total disability due to pneumoconiosis if: (a) He is suffering or suffered from a chronic dust disease of the lung which: (1) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the international classification of radiographs of the pneumoconioses by the international labor organization; or (2) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, that is, shows the existence of progressive massive fibrosis; or (3) when established by diagnosis by means other than those specified in subparagraphs (1) or (2) of this paragraph, would be a condition which could reasonably be expected to yield the results described in subparagraph (1) or (2) of this paragraph had diagnosis been made as therein prescribed. Provided, however, that any diagnosis made under this clause shall be in accordance with generally accepted medical procedures for diagnosing pneumoconiosis.

(b) (1) He is unable to engage in any substantial gainful activity by reason of pneumoconiosis which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months; or (2) where the requirements of paragraph (a) of this section are met, the finding that a miner is under a total disability is established by irrebuttable presumption.

2. Evaluating total disability. (a) Total disability may not be found for purposes of this part unless pneumoconiosis is the impairment involved. Whether or not pneumoconiosis in a particular case constitutes a disability as defined in 1. (b) is determined from all the facts of that case. Primary consideration is given to the severity of the individual's pneumoconiosis. Medical considerations alone can, except where other evidence rebuts a finding of "disability," e.g., the individual is actually engaging in substantial gainful activity, justify a finding that the individual is under a disability where his impairment is one that meets the duration requirement in 1. (b), and is listed in the appendix to this subpart.

(b) Pneumoconiosis may be found disabling if it does prevent the individual from engaging in any substantial gainful activity. Such an individual, however, shall be determined to be under a disability only if his pneumoconiosis is the primary reason for his inability to engage in substantial gainful activity. In any such case it must be established that the individual has a respiratory impairment because of pneumoconiosis, demonstrated on the basis of an MVV and FEV₁ which are equal to or less than the values specified in the following table or by a medically equivalent test.

Height (Inches)	MVV(MBC) equal to or less than	and FEV ₁ equal to or less than
	L./Min.	L.
57 or less	52	1.4
58	53	1.4
59	54	1.4
60	55	1.5
61	56	1.5
62	57	1.5
63	58	1.5
64	59	1.6
65	60	1.6
66	61	1.6
67	62	1.7
68	63	1.7
69	64	1.8
70	65	1.8
71	66	1.8
72	67	1.9
73 or more	68	1.9

3. Evidence of pneumoconiosis. (a) A finding of the existence of pneumoconiosis may not be made in the absence of:

(1) A chest roentgenogram showing the existence of pneumoconiosis classified as category 1, 2, 3, A, B, or C, according to the international labor organization (1958), international labor organization (1968), or

union internationale contra cancer/Cincinnati (1968) classifications of the pneumoconioses (if the chest roentgenogram is classified as category Z, it should be reclassified as category O or category 1 and only the latter accepted as evidence of pneumoconiosis); or

(2) An autopsy showing the existence of pneumoconiosis; or

(3) A biopsy (other than a needle biopsy) showing the existence of pneumoconiosis. Such biopsy would not be expected to be performed for the sole purpose of diagnosing pneumoconiosis. Where a biopsy is performed for other purposes, however, (e.g., in connection with a lung resection), the report thereof will be considered in determining the existence of pneumoconiosis.

(b) The roentgenogram, to conform to accepted medical standards, should represent a posterior-anterior view of the chest, taken at a distance of six (6) feet between the X-ray tube and the X-ray film on a 14 by 17 inch X-ray film.

(c) A report of autopsy or biopsy shall include a detailed gross (macroscopic) and microscopic description of the lungs or visualized portions of the lungs. If an operative procedure has been performed to obtain a portion of a lung, the evidence should include a copy of the operative note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, the evidence should include a complete copy of the autopsy report.

4. Determining medical equivalence. (a) An individual's impairment shall be determined to be medically the equivalent of an impairment listed in the appendix to this subpart only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment.

(b) Any decision made under 2. (a) and 6. (a) as to whether an individual's impairment is medically the equivalent of an impairment listed in the appendix to this subpart, shall be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the board, relative to the question of medical equivalence.

(c) Any decision as to whether a medical test is medically equivalent to the test described in 2. (b) shall be based on appropriate medical evidence, including a judgment furnished by one or more physicians designated by the board, relative to the question of the medical equivalence of such test.

5. Evidence of origin of pneumoconiosis. (a) If a miner was employed for ten (10) years or more in coal mines and is suffering or has suffered from pneumoconiosis, it will be presumed, in the absence of evidence to the contrary, that the pneumoconiosis arose out of such employment.

(b) In any other case, a miner suffering or who has suffered from pneumoconiosis must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the coal mines.

6. Death due to pneumoconiosis. (a) A miner's death will be determined to have been due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which meets the requirements of 1. (a); or

(b) If a deceased miner was employed for ten (10) years or more in coal mines and died from a respirable disease, it will be presumed, in the absence of evidence to the contrary, that his death was due to pneumoconiosis. Death will be found due to a respirable disease when death is ascribed to a chronic dust disease, or to another chronic disease of the lung. Death will not be found due to a respirable disease in those cases in which the disease reported does not suggest a reasonable possibility that death was, in fact, due to pneumoconiosis (e.g., cancer of the lung, disease due to trauma, pulmonary emboli); or

(c) Under circumstances other than those in paragraphs (a) or (b) of this section, the claimant must submit the evidence necessary to establish that the miner's death was due to pneumoconiosis and that the pneumoconiosis arose out of employment in coal mines.

History: En. Sec. 15, Ch. 155, L. 1959; Amendments
amd. Sec. 4, Ch. 190, L. 1971. The 1971 amendment inserted "or pneumoconiosis" after "other than silicosis" in the first paragraph of subdivision A 1; and added the present subsection B.

92-1315.1. Medical definition of totally disabling pneumoconiosis. A miner with pneumoconiosis, as evidenced in 3. of this part, plus one of the following sets of medical specifications, may be found to be under a total disability, in the absence of evidence rebutting such finding:

(1) Airway obstruction demonstrated on spirogram by MVV and FEV₁ equal to or less than the values specified in the following table:

Height (Inches)	MVV(MBC) equal to or less than	FEV ₁ equal to and or less than
	L./Min.	L.
57 or less	32	1.0
58	33	1.0
59	34	1.0
60	35	1.1
61	36	1.1
62	37	1.1
63	38	1.1
64	39	1.2
65	40	1.2
66	41	1.2
67	42	1.3
68	43	1.3

Height MVV(MBC) equal FEV₁ equal to
(Inches) to or less than and or less than

	L./Min.	L.
69	44	1.3
70	45	1.4
71	46	1.4
72	47	1.4
73 or more	48	1.4

or

(2) Total vital capacity equal to or less than the values specified in the following table:

Height V.C. equal to
(Inches) or less than

	(L.)
57 or less	1.2
58	1.3
59	1.3
60	1.4
61	1.4
62	1.5
63	1.5
64	1.6
65	1.6
66	1.7
67	1.7
68	1.8
69	1.8
70	1.9
71	1.9
72	2.0
73 or more	2.0

or

(3) Diffusing capacity of the lungs for carbon monoxide less than 6 ml./mm. Hg./min. (steady-state methods) or less than 9 ml./mm. Hg./min. (single-breath methods) or less than thirty per cent (30%) of predicted normal (all methods—actual value and predicted normal for the method used should be reported); or

(4) Arterial oxygen saturation at rest and simultaneously determined arterial p CO₂ equal to, or less than, the values specified in the following table:

Arterial p CO ₂ mm. and	Arterial O ₂ saturation equal to or less than (%)
30 mm.Hg. or below -----	93
31 mm.Hg.	93
32 mm.Hg.	92
33 mm.Hg.	92
34 mm.Hg.	91
35 mm.Hg.	91
36 mm.Hg.	90
37 mm.Hg.	89
38 mm.Hg.	88
39 mm.Hg.	88
40 mm.Hg. or above	87

(5) Cor pulmonale with right-sided congestive failure as evidenced by peripheral edema and liver enlargement, with:

(A) Right ventricular enlargement or outflow tract prominence on X-ray or fluoroscopy; or

(B) ECG showing QRS duration less than 0.12 second and R of 5 mm. or more in V₁ and R/S of 1.0 or more in V₁ and transition zone (decreasing R/S) left of V₁; or

(6) Congestive heart failure with signs of vascular congestion such as hepatomegaly or peripheral or pulmonary edema, with:

(A) Cardio-thoracic ratio of fifty-five per cent (55%) or greater, or equivalent enlargement of the transverse diameter of the heart, as shown on teleroentgenogram (6-foot film); or

(B) Extension of the cardiac shadow (left ventricle) to the vertebral column on lateral chest roentgenogram and total of S in V₁ or V₂ and R in V₅ or V₆ of 35 mm. or more on ECG.

History: En. Sec. 5, Ch. 190, L. 1971.

Title of Act

An act to provide revisions to "The Occupational Disease Act of Montana" in compliance with the mandate of the Congress of the United States as required by the provisions of Public Law 91-173 of the Ninety-first Congress; and providing for the payment of benefits for total disability or death to a coal miner due to defined pneumoconiosis substantially to, or greater than, the amount of benefits prescribed by said public law and to prescribe standards and definitions for determining death or total disability due to pneumoconiosis, which are substantially equivalent to those established by said public law and regulations by the secretary of health, education and welfare; and providing for the submission of any claim, for benefits within three years of

discovery of total disability or death from said disease; and providing for the liability of prior and successor operators for all benefits for miners at such mine on or after December 30, 1969; amending section 92-1303, R. C. M., 1947, relating to definitions of disablement and pneumoconiosis; amending section 92-1310, R. C. M., 1947, relating to liability of last employer; amending section 92-1312, R. C. M., 1947, relating to time in which a claim may be presented; amending section 92-1315, R. C. M., 1947, relating to procedure for medical examination; amending section 92-1321, R. C. M., 1947, relating to compensation benefits payable under said act; and providing an appendix setting forth appropriate charts for determination of disability and providing standards for interpretation thereof; and providing an effective date.

92-1321. Compensation benefits payable under this act. The compensation to which an employee temporarily totally disabled or perma-

nently totally disabled by an occupational disease, or his beneficiaries and dependents in the case of death caused by an occupational disease, shall be entitled to under this act shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time, as is provided in cases of temporary total disability, permanent total disability and in cases of injuries causing death under the Workmen's Compensation Act of the state of Montana. Benefit payments for total disability or death due to pneumoconiosis shall, for the purpose of this act, be made as follows:

a. In the case of total disability of a miner due to pneumoconiosis the disabled miner shall be paid benefits during the disability at the rate of one hundred fifty-five dollars (\$155) per month.

b. In the case of death of a miner due to pneumoconiosis or of a miner receiving benefits under this part, benefits shall be paid to his widow (if any) at the rate the deceased miner would receive such benefits if he were totally disabled.

c. In the case of an individual entitled to benefit payments under clause a. or b. who has one or more dependents, the benefit payments shall be increased at the rate of fifty per centum (50%) of such benefit payments, if such individual has one (1) dependent, seventy-five per centum (75%) if such individual has two (2) dependents, and one hundred per centum (100%) if such individual has three (3) or more dependents.

History: En. Sec. 21, Ch. 155, L. 1959; amd. Sec. 6, Ch. 190, L. 1971.

Amendments

The 1971 amendment added the last sentence, including the lettered subdivisions relating to pneumoconiosis, at the end of the section.

Repealing Clause

Section 7 of Ch. 190, Laws 1971 repealed all acts and parts of acts in conflict therewith.

Separability Clause

Section 8 of Ch. 190, Laws 1971 read "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Effective Date

Section 9 of Ch. 190, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved March 3, 1971.

92-1331. Rights of suit at common law.

Proof of Claim

Determination by industrial accident board that workman was not entitled to benefits for silicosis was not an exclusion of him from the act but was a finding he had not proved his claim; workman was

not within class of employees "not eligible for compensation" and could not sue employer for his alleged ailments. *Anaconda Co. v. District Court, Second Judicial Dist., Silver Bow County*, — M —, 506 P 2d 81.

92-1334. Compensation plans. Employers shall secure compensation to their employees under one of the following plans:

COMPENSATION PLAN NUMBER ONE

1. When and how employer may elect to adopt—direct payment to employee. Any employer in the industries, trades, works, occupations, or

employments in this act specified as hazardous, by filing his election to become, subject to and be bound by compensation plan No. 1, upon furnishing satisfactory proof to the division of his solvency and financial ability to pay the compensation and benefits in this act provided for, and to discharge all liabilities which are reasonably likely to be incurred by him during the fiscal year for which such election is effective, may, by order of the said division, make such payments directly to his employees as they may become entitled to receive the same under the terms and conditions of this act.

2. Proof of solvency of employer electing plan No. 1 to be filed. Every such employer engaged in the state of Montana, in the industries, trades, works, occupations, or employments herein mentioned, and who shall have elected to be bound by such compensation plan No. 1, shall file such proof of his solvency within the time and in such form as may be prescribed by the rules or orders of the division.

3. Employer permitted to carry on business and settle directly with employee—renewal of application. If such employer, making such election, shall be found by the division to have the requisite financial ability to pay the compensation and benefits in this act provided for, then the division shall grant to such employer permission to carry on his business for the fiscal year within which such election is made, and such proof filed, or the remaining portion of such fiscal year, and to make such payments directly to his employees as they may become entitled to receive the same. Every employer, so long as he continues in his employment, and so long as he continues to be bound by such compensation plan No. 1, shall, at least thirty (30) days before the expiration of each fiscal year, renew his application to be permitted to continue to make such payments as aforesaid directly to his employees for the next ensuing fiscal year, and under like circumstances as those mentioned for the granting of such permission upon such first application, the division may renew the same from year to year.

4. Additional proof of solvency—revocation of order. The division may at any time require from any employer acting under compensation plan No. 1 additional proof of solvency and financial ability to pay the compensation provided by this act, and may at any time, upon notice to such employer of not less than ten (10) or more than twenty (20) days, after and upon a full hearing, revoke any order or approval theretofore made.

5. Requiring security of employer. If the division shall find that such employer has no financial responsibility for the payment of the compensation herein provided to be paid, which might reasonably be expected to be chargeable to such employer during the fiscal year to be covered by such permission, the division must so find, and must require such employer, before granting to him such permission, or before continuing or engaging in such employment, subject to the provisions of compensation plan No. 1, to give security for such payment, which security must be in such an amount as the division finds reasonable and necessary to meet all liabilities of such employer, which may reasonably and ordinarily be expected to accrue during such fiscal year. The security must be deposited with the division, may be a certain estimated per cent of the employer's last preced-

ing annual payroll, or a certain per cent of the established amount of his annual payroll for the fiscal year or the security may be in the form of a bond or undertaking executed to the division in the amount to be fixed by it with two or more sufficient sureties, which undertaking must be conditioned that such employer will well and truly pay, or cause to be paid, all such sums and amounts for which the employer shall become liable under the terms of this act to his employees during said fiscal year; or such security may consist of any state, county, municipal, or school district bonds, or the bonds or evidence of indebtedness of any individuals or corporations which the division may deem solvent; and every such deposit and the character and amount of such securities shall at all times be subject to approval, revision, or change by the division as in its judgment may be required, and upon proof of the final payment of the liability for which such securities are given, such securities, or any remaining part thereof, shall be returned to the depositor. The division is liable for the value and safekeeping of all such deposits or securities.

6. Failure of employer to pay compensation—duty of division. Upon failure of the employer to pay any compensation provided for in this act, upon the terms and in the amounts and at the times when the same shall become due and payable, it shall be the duty of the division, upon demand of the person to whom compensation is due, to apply any deposits made with the division to the payment of the same, and it shall be its duty to take the proper steps to convert any securities on deposit with the division, or sufficient thereof, into cash and to pay the same upon the liabilities of the employer, accruing under the terms of this act, and it shall be its duty, in so far as the same shall be necessary, to collect and enforce the collection of the liability of all sureties upon any bonds which may be given by the said employer to ensure the payment of his said liability. And to these ends, and for these purposes, the division shall be deemed to be the owner of the deposit and security and the obligee in the bond in trust for the said purposes, and may proceed in its own name to recover upon such bonds, or foreclose and liquidate the securities.

7. When employer to make deposit or security to guarantee payment of compensation. Within thirty (30) days after the happening of an accident where death or the nature of the disability renders the amount of future payments certain, or reasonably certain, the employer shall make a deposit or give security as herein defined with the division for the protection and guaranty of the payment of such liability, in such sum as the division may direct. However, if sufficient securities are already on deposit with the division, or if the division has determined that the employer has sufficient financial responsibility to meet the liability of the employer, together with other liabilities already accrued, no such additional deposit or security shall be demanded.

8. When employer may be relieved from liability. Any employer against whom liability may exist for compensation under this act, may, with the approval of the division, be relieved therefrom by:

(1) Depositing the present value or the estimated present value of the total unpaid compensation for which such liability exists, assuming interest at five per cent (5%) per annum, with the division; or

(2) Purchasing an annuity within the limitations provided by law, in any insurance company granting annuities, and authorized to transact business in this state, subject to the approval of the division.

COMPENSATION PLAN NUMBER TWO

1. * * * [Same as parent volume.]

2. Duty of employer electing plan No. 2—amount of insurance necessary. Any employer electing to become subject to and bound by compensation plan No. 2 shall file with the division written acceptance of the provisions of compensation plan No. 2, together with a statement upon forms provided by the division of the nature of his employment, the character and location of his works, the number of men employed during the preceding year, or any part of the preceding year, and the probable number of men to be employed during the first fiscal year to be covered by such election, and the division shall thereupon determine the amount of insurance which will be reasonably necessary to secure the compensation with which the said employer may reasonably be expected to become chargeable during such fiscal year. And thereupon the employer shall file the policy or policies of insurance herein provided for with the division, which policy or policies shall insure in the amount so fixed by the division against any and all liability of the employer to pay the compensation and benefits provided for in this act. The amount of such insurance shall be fixed by the division for each ensuing fiscal year during which the employer shall engage in his employment, and shall remain subject to the provisions of compensation plan No. 2, and for the purpose of fixing such amount of said insurance, the division may make all reasonable and necessary investigation, and the employer shall furnish to the division all information which it may require.

3. Policies to contain what. All policies insuring the payment of compensation under this act, must contain a clause to the effect that as between the employee and the insurer the notice to, or knowledge of the occurrence of the injury on the part of the insured, shall be deemed notice or knowledge, as the case may be, on the part of the insurer; that jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer; and that the insurer shall, in all things, be bound by and subject to the awards, order, judgments, or decrees rendered against such insured.

4. Agreement to be contained in policies of insurance—deposit of bonds. No such policy shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation all the installments of compensation or other payments in this act provided for, and that the obligation shall not be affected by any default of the insured after the disablement or by any default in the giving of any notice required by such policy or by this act or otherwise. Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation. Before issuance of any policy by an insurer as herein authorized, such insurer must deposit with the division, bonds of the United States or the state of Montana, or of any school district,

county, city or town in the state of Montana, in an amount not less than twenty thousand dollars (\$20,000.00) or more than one hundred thousand dollars (\$100,000.00) as the division may determine. If any insurer shall fail to discharge any liability after the amount thereof shall be determined by the division, and within the time limited by the division, it shall be the duty of the division to convert the bonds, or such part thereof as is necessary, into cash, and from the proceeds liquidate such liability in the manner hereinafter provided; and thereafter the insurer must make an additional deposit to meet any deficiency caused thereby. It is intended hereby to give the division the discretion in the matter of whether an insurer has failed to discharge any liability.

5. Policies made subject to this act—form of insurance. Every policy for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act. No insurer shall enter into any such policy of insurance unless its form shall have been approved by the division, as otherwise provided by law.

6. Renewals. Every renewal of such policy shall be made and delivered to the division at least thirty (30) days prior to the expiration of the expiring policy.

7. Deposits by insurer with division. Within thirty (30) days of the happening of an accident where death or the nature of the disablement renders the amount of future payments certain or reasonably certain, the insurer shall make a deposit, as herein defined, with the division for the protection and guarantee of the payment of such liability in such sum as the division may direct. However, if the division deems the amount on deposit by the insurer under the provisions of paragraph 4 of plan two (2), in this section, sufficient to cover all liabilities of the insurer, then no further deposit shall be required.

8. How insurer relieved from liability. Any insurer against whom liability may exist for compensation under this act, may, with the approval of the division, be relieved therefrom by:

1. Depositing the present value or the estimated present value of the total unpaid compensation for which such liability exists, assuming interest at five per centum (5%) per annum, with the division; or

2. By purchasing an annuity within the limitations provided by law in any insurance company granting annuities, and authorized to transact business in this state, subject to the approval of the division.

9. Cancellation of insurance policy. No policy of insurance issued under the provisions of compensation plan No. 2 shall be canceled within the time limited for its expiration except upon thirty (30) days' notice to the employer in favor of whom such policy is issued, and to the division unless such policy sought to be canceled shall have been sooner replaced by other insurance.

10. Report of insurance companies to division. Every insurance company transacting business under this act shall, at the time and in the manner prescribed by the division, make and file with the division such reports of accidents as the division may require.

11. Policies to contain clause agreeing to do what—approval or change. Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that the insurer shall be directly and primarily liable to and will pay directly to the employee, or in case of death, to his beneficiaries, or major or minor dependents, the compensation, if any, for which the employer is liable. Every such policy shall at all times be subject to the approval, change, or revision by the division, and shall contain the clauses, agreements, and promises required by this act.

12. Deposits under plan No. 2 as security. Any deposit made under the provisions of compensation plan No. 2 shall be held in trust by the division as security for the payment of the liability for which the deposit was made. Such deposit may be reduced from time to time with the permission of the division, as the payment of the liability of the insurer may reduce the amount required to be on deposit. Such deposit may be changed or renewed when desired by the depositor, by withdrawing the same, or any part thereof, and substituting other deposits therefor; upon proof of the final payment of the liability for which such deposit was made, any deposit remaining shall be returned to the depositor. All earnings made by such deposit shall be first applied upon any liability of the depositors, and if no such liability exists, then such earnings shall upon demand be delivered to such depositor. The division shall be liable for the value and safekeeping of such deposit.

COMPENSATION PLAN NUMBER THREE

1. It is the intent and purpose of compensation plan No. 3 that each employer subject to and bound by this plan shall be liable and pay for all disability to employees due to occupational diseases coming under the provision of this plan, and that all funds collected by assessments as herein provided shall be paid into one common account to be known as the occupational disease compensation account in the agency fund, which account shall be devoted exclusively to the payment of all valid claims for disability from occupational diseases arising out of or in the course of employment coming under the provisions of compensation plan No. 3. Such account shall consist of all assessments and penalties received and paid into the account, or property and securities acquired by and through the use of money belonging to the account, and interest earned upon money belonging to the account, together with any money appropriated by the legislature for the purpose of this act. The accounts of employers insured in such account shall be kept in such a manner as the division may prescribe for the purpose of providing information and statistics necessary for determining any changes in rates of classification of employment. The occupational disease compensation account shall be neither more nor less than self-supporting.

2. Any employer, whether subject to and bound by this act or not, may elect to comply with the provisions of compensation plan No. 3 and pay into the occupational disease compensation account the premiums provided in this act, in which event such employer shall not be liable to respond in damages at common law or by statute for disability or death

of an employee due to an occupational disease during the period covered by such premiums and shall enjoy the benefits and privileges of this act. The employee of such an employer shall be deemed to have elected to come under the provisions of this act unless such employee shall execute and file with the division on proper form to be furnished for that purpose, a specific election not to be so bound, in which event he shall not enjoy the benefits or privileges of this act until such election is withdrawn.

3. All employments, occupations, or industries affected by the provisions of compensation plan No. 3 shall be divided by the division for the purpose of the occupational disease compensation account into classes whose rates may be set and readjusted at such times as the division may determine. The division may rearrange the classes by withdrawing any employment embraced in one class and transferring it wholly or in part to another class. Separate counts shall be kept of the amounts collected and expended in each class for determining rates, but for paying compensation and dividends the account in the agency fund shall be one and indivisible. The division shall determine the hazard of the different classes of occupations or industries, and fix the rates of assessment therefor at a percentage of the annual total payroll of such employer at the lowest rate consistent with the maintenance of a solvent occupational disease compensation account, and the creation of necessary surpluses and reserves, and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk. The division, in fixing rates, shall provide for the expenses of administering the account, the disbursements on account of occupational disease to employees in each class, reserves adequate to meet anticipated and unexpected losses, reserves adequate to carry the class to maturity, and such other necessary reserves and surpluses as may be determined by the division. The division is authorized, in its discretion, to apply tentative rates, subject to modification in accordance with the loss experience of such risks.

4. The initial payment of assessments provided for herein by employers, whether presently engaged in a business, occupation or industry, subject to this act, or an employer who enters such business, occupation or industry at some future date, and all subsequent payment of assessments herein provided shall be made at such times and in such amounts as may be ordered and prescribed by the division.

5. Any employer who is in default in the observance of any order of the division issued pursuant to the provisions of this act, shall, in addition to any other penalty provided by this act, be charged an advance of twenty-five per cent (25%) over the established rate, and such advance rate shall continue to be in force until such employer shall have ceased to be in such default.

6. * * * [Same as parent volume.]

7. The board of investments shall invest in bonds of the United States, bonds of the state of Montana, or bonds of any county, city, or school district in the state of Montana, or any other security which may

be approved by the board of investments, and out of the same and its earnings shall be paid such compensation and benefits as the division may direct. However, when there is sufficient money in the occupational disease compensation account to meet such compensation payments, any surplus or earnings remaining may be invested in the securities specified in this section.

8. If any employer shall default in any payment to the occupational disease account, the sum due may be collected by an action at law in the name of the state and such right of action shall be cumulative. The division is hereby authorized, in its discretion, to cancel any employer's right to operate under compensation plan No. 3 for failure to pay the premiums due. When the division makes an order canceling an employer's right for failure to pay premiums or assessments the division shall make such order at least sixty (60) days before the cancellation becomes effective and send a formal notice to the sheriff or sheriffs of the county or counties wherein the employer is operating, and the said sheriff or sheriffs shall post a notice in at least three (3) conspicuous places where the workmen can readily see the notices to the effect that the division has canceled the right of the employer to operate under the act, and the notice shall give the date of the effectiveness of the order. After the cancellation date the employer shall have the same status as an employer who is not enrolled under the Occupational Disease Act.

When an employer's right to operate has been canceled by the division for failure to pay premiums and when the division, in its discretion, finds that the property and assets of the employer are not sufficient to pay premiums, the division may compromise the claim for premiums and accept a payment of an amount less than the total amount due.

9 and 10. * * * [Same as parent volume.]

11. Any cause of action assigned to the state under the provisions of subsection 10 of this section may be prosecuted or compromised by the division in its discretion.

12. Where an employee is entitled to compensation under compensation plan No. 3, he shall file with the division his application therefor, together with the certificate of the physician attending him, and the physician to lend all necessary assistance in making application for compensation and such proof of other matters as may be required by the rules of the division without charge to the employee. The filing of a certificate of the attending physician shall not constitute a sworn claim for compensation.

13. For proper compliance with the provisions of subsection 12 of this section, the physician, after approval by the division, shall be paid out of the occupational disease compensation account.

14. Where death results from an occupational disease, the parties entitled to compensation under compensation plan No. 3, or someone in their behalf, shall make application for the same to the division. The application must be accompanied with proof of death and proof of relationship, showing the parties entitled to compensation, certificate of the

attending physician, if any, and such other proof as may be required by the division.

15. * * * [Same as parent volume.]

16. Disbursements out of the occupational disease compensation account in the agency fund shall be made by the division. If at any time there shall not be sufficient money in the occupational disease compensation account with which to pay any warrants drawn thereon, the employer, on account of whose workmen the warrant was drawn, shall pay the same, and upon his next contribution to such fund he shall be credited with the amount so paid, with interest thereon at the rate of six per cent (6%) per annum from the date of such payment to the date upon which the next assessment becomes payable; and if the amount of the credit exceeds the amount of such assessment, he shall have a warrant upon such account for the excess, and if the warrant be not paid for want of funds, it shall be credited to such employer and be applied upon succeeding assessments.

17. All earnings made by the occupational disease compensation account by reason of interest paid for the deposit thereof, or otherwise, shall be credited to and become a part of the account, and the making of profit, either directly or indirectly, by any person, out of the use of the occupational disease compensation account shall constitute a felony, and on conviction thereof shall subject the person making such profit to imprisonment in the state penitentiary for a term not exceeding two (2) years, or a fine not exceeding five thousand dollars (\$5,000.00), or both such fine and imprisonment.

History: En. Sec. 34, Ch. 155, L. 1959; amd. Sec. 172, Ch. 147, L. 1963; amd. Sec. 1, Ch. 88, L. 1974.

Amendments

The 1974 amendment substituted "division" for "board," "industrial accident board," "treasurer of the board," and "treasurer of the industrial accident board" throughout the section; under Compensation Plan Number One, deleted "The industrial accident board shall require a fee of five dollars (\$5.00) for the filing of every such proof of solvency" from the end of paragraph 2; deleted "and shall, at any time, upon demand of the bondsmen or the depositor or the board, account for the same, and the earnings thereof" from the end of paragraph 5; under Compensation Plan Number Two, deleted "When any such policy, or the renewal thereof, is filed with the industrial accident board, the same shall be accom-

panied by a fee of three dollars (\$3.00)" from the end of paragraph 3; deleted "and shall at any time upon demand of his bondsmen, the depositor, or the board, account for the same and the earnings thereof" from the end of paragraph 12; under Compensation Plan Number Three, substituted "board of investments" for "board" and "treasurer of the board" in paragraph 7; deleted "five dollars (\$5.00) for each case" from the end of paragraph 13; deleted "as the board may order" from the end of the first sentence in paragraph 16; substituted "any" before "person" near the middle of paragraph 17 for "the treasurer of the board or any other"; deleted "and the treasurer of the board shall be liable upon his official bond for all profits realized for any unlawful use of the said fund" from the end of paragraph 17; and made minor changes in style, punctuation, and phraseology.

CHAPTER 14—REHABILITATION OF INJURED WORKMEN

Section 92-1403. Expenses payable to workman receiving training.

92-1403. Expenses payable to workman receiving training. The eligibility of any injured workman to receive other benefits under the

Workmen's Compensation Act of the state of Montana shall in no way be affected by his entrance upon a course of vocational rehabilitation as herein provided, but he may be paid, in addition thereto, upon the certification of the vocational rehabilitation division from funds herein provided, (1) his actual and necessary travel expenses from his place of residence to the place of training, and return, (2) his living expenses while in training in an amount not in excess of fifty dollars (\$50) per week, his expenses for tuition, books and necessary equipment in training.

History: En. Sec. 3, Ch. 21, L. 1961;
amd. Sec. 1, Ch. 363, L. 1971.

Amendments

The 1971 amendment, substituted "may" for "shall" before "be paid"; deleted "away from home" after "while in training"; and increased the weekly living expense allowance from \$30 to \$50.

MONTANA UNIFORM PROBATE CODE

TITLE 91A

1947 REVISED CODES OF MONTANA

Effective July 1, 1975

As enacted by

THE SECOND REGULAR SESSION OF THE
FORTY-THIRD LEGISLATIVE ASSEMBLY
CHAPTER 365, LAWS OF 1974

THE ALLEN SMITH COMPANY

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Indianapolis, Indiana 46202



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FOREWORD

This pamphlet contains the complete text of the Uniform Probate Code adopted by Chapter 365, Laws of 1974, to become effective July 1, 1975.

Various portions of this Uniform Probate Code, designated as Title 91A, either embody, supersede or conflict with statutes now contained principally in Title 91 of the Revised Codes of Montana. The Repealing Clause of Chapter 365 is set forth following section 91A-6-104 on page 166 herein.

The 1974 Act amended thirteen sections and enacted one new section codified in Title 91; these sections are printed beginning on page 167 following the text of the new Probate Code.

Included in this pamphlet as notes following most of the sections of the Uniform Probate Code are the Official Comments prepared by the Joint Editorial Board for the Uniform Probate Code, an arm of the National Conference of Commissioners on Uniform Probate Code. The Comments have been edited occasionally for adaptation to the Montana version of the Uniform Code.

The Index to the Uniform Probate Code prepared by its Joint Editorial Board, modified in substance as required by variations in the Montana adoption, appears at the end of this pamphlet commencing on page 175.

TITLE 91A

UNIFORM PROBATE CODE

Chapter

1. General provisions, definitions, and probate jurisdiction of court.
 - Part 1. Short title, construction, general provisions, 91A-1-101 to 91A-1-108.
 2. Definitions, 91A-1-201.
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CHAPTER 1

GENERAL PROVISIONS, DEFINITIONS, AND PROBATE JURISDICTION OF COURT

Part

1. Short title, construction, general provisions, 91A-1-101 to 91A-1-108.
2. Definitions, 91A-1-201.

3. Scope, jurisdiction and courts, 91A-1-301 to 91A-1-309.
4. Notice, parties and representation in estate litigation and other matters, 91A-1-401 to 91A-1-403.

Part 1—Short Title, Construction, General Provisions

Section

- 91A-1-101. Short title.
 91A-1-102. Purposes—rules of construction.
 91A-1-103. Supplementary general principles of law applicable.
 91A-1-104. Severability.
 91A-1-105. Construction against implied repeal.
 91A-1-106. Effect of fraud and evasion.
 91A-1-107. Evidence as to death or status.
 91A-1-108. Acts by holder of general power.

91A-1-101. Short title. This act shall be known and may be cited as the Uniform Probate Code.

History: En. 91A-1-101 by Sec. 1, Ch. 365, L. 1974.

Title of Act

An act to be known as the "Uniform Probate Code" relating to affairs of decedents, missing persons, protected persons, minors, incapacitated persons and certain others; consolidating and revising the law relating to wills and intestacy and the administration and distribution of estates of decedents, missing persons, protected persons, minors, incapacitated persons and certain others; ordering the powers and procedures of the court concerned with the affairs of decedents and certain others; providing for the termination of joint tenancies and life estates; repealing sections 22-101 through 22-117, 91-101, 91-102, 91-107, 91-108, 91-113 through 91-116, 91-122, 91-125 through 91-130, 91-135 through 91-139, 91-141, 91-201, 91-210, 91-214 through 91-217, 91-227, 91-235, 91-301, 91-303, 91-304, 91-307, 91-308, 91-311 through 91-314, 91-317, 91-319, 91-321, 91-402 through 91-405, 91-411 through 91-418, 91-423 through 91-430, 91-520 through 91-522, 91-612A, 91-612B, 91-701, 91-702, 91-801 through 91-811, 91-901, 91-904, 91-1001 through 91-1003, 91-1101 through 91-1105, 91-1107, 91-1301 through 91-1303, 91-1305 through 91-1312, 91-1401, 91-1402, 91-1404 through 91-1406, 91-1501 through

91-1509, 91-1601 through 91-1604, 91-1701 through 91-1723, 91-1801 through 91-1807, 91-1901 through 91-1906, 91-2002 through 91-2004, 91-2101 through 91-2105, 91-2201 through 91-2204, 91-2207 through 91-2213, 91-2401 through 91-2407, 91-2501 through 91-2507, 91-2601 through 91-2612, 91-2701 through 91-2705, 91-2707 through 91-2712, 91-2715 through 91-2720, 91-2723, 91-2724, 91-2801 through 91-2810, 91-2901, 91-2902, 91-3001 through 91-3039, 91-3101 through 91-3109, 91-3201 through 91-3204, 91-3209 through 91-3212, 91-3301 through 91-3313, 91-3405, 91-3407, 91-3601 through 91-3608, 91-3701 through 91-3706, 91-3801 through 91-3803, 91-3901 through 91-3907, 91-4001 through 91-4012, 91-4101 through 91-4106, 91-4311, 91-4314 through 91-4316, 91-4321, 91-4322, 91-4501 through 91-4508, 91-4510 through 91-4518, 91-4522 through 91-4525, 91-4601 through 91-4604, 91-4606 through 91-4608, 91-4610, 91-4611, 91-4701 through 91-4706, 91-4801 through 91-4822, 91-4901 through 91-4904, 91-4906, 91-4907, 91-4909 through 91-4911, 91-5001 through 91-5007, 91-5101 through 91-5111, 91-5202, 91-5203, 91-5210, 91-5301 through 91-5312, and 93-1404.4, R. C. M. 1947; and amending sections 91-131, 91-218, 91-612, 91-1106, 91-3406, 91-4411, 91-4417, 91-4423, 91-4430, 91-4437, 91-4438, 91-4448, and 91-4467, R. C. M. 1947; and providing an effective date.

91A-1-102. Purposes—rules of construction. (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(b) to discover and make effective the intent of a decedent in distribution of his property;

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS 91A-1-106

(c) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to its successors;

(d) to make uniform the law among the various jurisdictions.

History: En. 91A-1-102 by Sec. 1, Ch. 365, L. 1974.

91A-1-103. Supplementary general principles of law applicable. Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.

History: En. 91A-1-103 by Sec. 1, Ch. 365, L. 1974.

91A-1-104. Severability. If any provision of this code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

History: En. 91A-1-104 by Sec. 1, Ch. 365, L. 1974.

91A-1-105. Construction against implied repeal. This code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

History: En. 91A-1-105 by Sec. 1, Ch. 365, L. 1974.

91A-1-106. Effect of fraud and evasion. Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief including restitution against the perpetrator of the fraud or any person benefiting from the fraud, whether innocent or not (other than a bona fide purchaser for value and without notice). Any proceeding must be commenced within two (2) years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five (5) years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

History: En. 91A-1-106 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This is an overriding provision that provides an exception to the procedures and limitations provided in the code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be forgery is probated informally, and the forgery is not

discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three-year period (section [91A-3-108]) has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing (section [91A-3-1006]). However, if there is fraudulent misrepresentation or concealment in

the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under section [91A-3-1001] of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under section [91A-1-106] but would be bound by the litigation in which the issue could have been raised.

The usual rules for securing relief for fraud on a court would govern, however.

The final limitation in this section is

designed to protect innocent distributees after a reasonable period of time. There is no limit (other than the two years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a court may conclude there has been a discovery of the fraud at that stage. On the other hand there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

91A-1-107. Evidence as to death or status. In proceedings under this code the rules of evidence in courts of general jurisdiction including any relating to simultaneous deaths, are applicable unless specifically displaced by the code. In addition, the following rules relating to determination of death and status are applicable:

(1) a certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death and the identity of the decedent;

(2) a certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report;

(3) a person who is absent for a continuous period of seven (7) years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

History: En. 91A-1-107 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment substitutes "period of seven (7) years" for "period of five (5) years" in subdivision (3).

Editorial Board Comment

Subsection (3) is inconsistent with section 1 of Uniform Absence as Evidence of Death and Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be commenced as provided in [section 91A-5-401].

The preliminary paragraph is designed to accommodate the Uniform Simultaneous Death Act, if it is a part of a state's law. [The Uniform Simultaneous Death Act, Sections 91-423 to 91-430, is repealed effective July 1, 1975.]

91A-1-108. Acts by holder of general power. For the purpose of granting consent or approval with regard to the acts or accounts of a

personal representative, including relief from liability or penalty for failure to post bond, or to perform other duties the sole holder or all coholders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

History: En. 91A-1-108 by Sec. 1, Ch. 365, L. 1974.

from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is intended to refer to the common-law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

Editorial Board Comment

The status of a holder of a general power in estate litigation is dealt with by section [91A-1-403].

This section permits the settlor of a revocable trust to prevent the trustee

Part 2—Definitions

Section

91A-1-201. General definitions.

91A-1-201. General definitions. Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in this code:

(1) "Application" means a written request to the clerk for an order of informal probate or appointment under sections 91A-3-301 through 91A-3-309, inclusive.

(2) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved.

(4) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) "Clerk" or "clerk of court" means the clerk of the district court.

(6) "Court" means the court having jurisdiction in matters relating to the affairs of decedents. This court in this state is known as district court.

(7) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(8) "Devise," when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

(9) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(10) "Disability" means cause for a protective order as described by section 91A-5-401.

(11) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(12) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this code as originally constituted and as it exists from time to time during administration.

(13) "Exempt property" means that property of a decedent's estate which is described in section 91A-2-402.

(14) "Fiduciary" includes personal representative, guardian, conservator and trustee.

(15) "Foreign personal representative" means a personal representative of another jurisdiction.

(16) "Formal proceedings" means those conducted before a judge with notice to interested persons.

(17) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(18) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(19) "Incapacitated person" is as defined in section 91A-5-101.

(20) "Informal proceedings" mean those conducted without notice to interested persons by the clerk of court for probate of a will or appointment of a personal representative.

(21) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(22) "Issue" of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code.

(23) "Lease" includes an oil, gas, coal or other mineral lease.

(24) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(25) "Minor" means a person who is under eighteen (18) years of age.

(26) "Mortgage" means any conveyance, agreement or arrangement in which property is used as security.

(27) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal entity.

(29) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question.

(30) "Person" means an individual, a corporation, an organization, or other legal entity.

(31) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(32) "Petition" means a written request to the court for an order after notice.

(33) "Proceeding" includes action at law and suit in equity.

(34) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(35) "Protected person" is as defined in section 91A-5-101.

(36) "Protective proceeding" is as defined in section 91A-5-101.

(37) "Securities" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(38) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution and closing.

(39) "Special administrator" means a personal representative as described by sections 91A-3-614 through 91A-3-618.

(40) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(41) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(42) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under his will or this code.

(43) "Supervised administration" refers to the proceedings described in sections 91A-3-501 through 91A-3-505 inclusive.

(44) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(45) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, custodial arrangements pursuant to Title 67, chapter 18, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(46) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(47) "Ward" is as defined in section 91A-5-101.

(48) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

History: En. 91A-1-201 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment substituted the definition of "Clerk" or "clerk of court" in subdivision (5) for a definition of "Registrar"; deleted "trust accounts as defined in Article VI" after "personal representatives" in the second sentence of subdivision (45); and made minor changes in phraseology.

Articles VI and VII, referred to in the Comment were omitted from the Montana enactment.

Editorial Board Comment

Additional sections with special definitions for [Chapter 5] and [Article] VI are [91A-5-101] and 6-101. Except as controlled by special definitions applicable to [chapter 5], the definitions in [91A-1-201] apply to the entire code.

The definition of "trust" and the use of the term in Article VII eliminate procedural distinctions between testamentary and inter vivos trusts. Article VII does not deal with questions of substantive validity of trusts where a difference be-

tween inter vivos and testamentary trusts will continue to be important.

The exclusions from the definition of "trust" are modeled basically after those in section 1, Uniform Trustees' Powers Act. The exclusions in the act for "a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration" are omitted above. The first of these is inappropriate because of Article VI's treatment of "Totten Trusts." Moreover, the probate court remedies and procedures being established by Article VII would seem suitable to unclassified trustee-beneficiary relationships that are in the nature of express trusts. Perhaps many controversies involving "hold and deliver" trusts or other dubious arrangements will involve the issue of whether there is a trust, but there would seem to be no harm in conferring jurisdiction on the probate court for these controversies.

The meanings of "child," "issue" and "parent" are related to section [91A-2-109].

See Comment, section 7-101, concerning the definition of "trustee."

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Part 3—Scope, Jurisdiction and Courts

Section

- 91A-1-301. Territorial application.
- 91A-1-302. Subject matter jurisdiction.
- 91A-1-303. Venue—multiple proceedings—transfer.
- 91A-1-304. Practice in court.
- 91A-1-305. Records and certified copies.
- 91A-1-306. Jury trial.
- 91A-1-307. Clerk of court—powers.
- 91A-1-308. Appeals.
- 91A-1-309. Oath or affirmation on filed documents.

91A-1-301. Territorial application. Except as otherwise provided in this code, this code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected in this state,

(2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state, and

(3) incapacitated persons and minors in this state.

History: En. 91A-1-301 by Sec. 1, Ch. 365, L. 1974.

91A-1-302. Subject matter jurisdiction. (1) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to

(a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and

(b) protection of minors and incapacitated persons.

(2) The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

History: En. 91A-1-302 by Sec. 1, Ch. 365, L. 1974.

91A-1-303. Venue—multiple proceedings—transfer. (1) Where venue for a proceeding under this code may lie in more than one county in the state, the court in which the proceeding is first commenced has the exclusive right to proceed.

(2) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one (1) court of this state, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(3) If a court finds that as a matter of law or in the interest of justice a proceeding or a file should be located in another court of this state, the court making the finding may transfer the proceeding or file to the other court.

History: En. 91A-1-303 by Sec. 1, Ch. 365, L. 1974.

91A-1-304. Practice in court. Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the rules of civil procedure including the rules concerning vacation of orders and appellate review govern formal proceedings under this code.

History: En. 91A-1-304 by Sec. 1, Ch. 365, L. 1974.

91A-1-305. Records and certified copies. The clerk of court shall keep a record for each decedent, ward, protected person or trust involved in any document which may be filed with the court under this code, including petitions and applications, demands for notices or bonds, and of any orders or responses relating thereto by the clerk or court, and establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment.

History: En. 91A-1-305 by Sec. 1, Ch. 365, L. 1974.

91A-1-306. Jury trial. (1) If duly demanded, a party is entitled to trial by jury in a formal testacy proceeding, a formal proceeding for determination of heirship and any other proceeding as may be provided for by law.

(2) If there is no right to trial by jury under subsection (1) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

History: En. 91A-1-306 by Sec. 1, Ch. 365, L. 1974.

91A-1-307. Clerk of court—powers. The acts and orders which this code specifies as performable by the clerk of court may be performed either by a judge of the court or by the clerk of court.

History: En. 91A-1-307 by Sec. 1, Ch. 365, L. 1974.

91A-1-308. Appeals. Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments and power of the appellate court, is governed by the statutes and rules applicable to the appeals to the Supreme Court.

History: En. 91A-1-308 by Sec. 1, Ch. 365, L. 1974.

91A-1-309. Oath or affirmation on filed documents. Except as otherwise specifically provided in this code or by rule, every document filed with the court under this code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to

the effect that its representations are true as far as the person executing or filing it knows or is informed; deliberate falsification therein shall constitute the offense of false swearing.

History: En. 91A-1-309 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as adopted by the

National Conference of Commissioners is designated as section 1-310; the Montana enactment omitted section 1-309 of the Uniform Probate Code pertaining to qualifications of a judge of the court.

Part 4—Notice, Parties and Representation in Estate Litigation and Other Matters

Section

91A-1-401. Notice—method and time of giving.

91A-1-402. Notice—waiver.

91A-1-403. Pleadings—when parties bound by others—notice.

91A-1-401. Notice—method and time of giving. (1) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(a) by mailing a copy thereof at least fourteen (14) days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post-office address given in his demand for notice, if any, or at his office or place of residence, if known;

(b) by delivering a copy thereof to the person being notified personally at least fourteen (14) days before the time set for the hearing; or

(c) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three (3) consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least ten (10) days before the time set for the hearing.

(2) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(3) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

History: En. 91A-1-401 by Sec. 1, Ch. 365, L. 1974.

91A-1-402. Notice—waiver. A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

History: En. 91A-1-402 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The subject of appearance is covered by section [91A-1-304].

91A-1-403. Pleadings—when parties bound by others—notice. In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(a) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(b) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child.

(c) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(a) Notice as prescribed by section 91A-1-401 shall be given to every interested person or to one who can bind an interested person as described in (2)(a) or (2)(b) above. Notice may be given both to a person and to another who may bind him.

(b) Notice is given to unborn or unascertained persons, who are not represented under (2)(a) or (2)(b) above, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

History: En. 91A-1-403 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

A general power, as used here and in section [91A-1-108], is one which enables the power holder to draw absolute ownership to himself. The section assumes a valid general power. If the validity of the power itself were in issue, the power

holder could not represent others, as for example, the takers in default.

The general rules of civil procedure are applicable where not replaced by specific provision, see section [91A-1-304]. Those rules would determine the mode of giving notice or serving process on a minor or the mode of notice in class suits involving large groups of persons made party to a suit.

INTESTATE SUCCESSION

CHAPTER 2

INTESTATE SUCCESSION AND WILLS

Part

1. Intestate succession, 91A-2-101 to 91A-2-112.
2. Elective share of surviving spouse, 91A-2-201 to 91A-2-207.
3. Spouse and children unprovided for in wills, 91A-2-301, 91A-2-302.
4. Exempt property and allowances, 91A-2-401 to 91A-2-405.
5. Wills, 91A-2-501 to 91A-2-513.
6. Rules of construction, 91A-2-601 to 91A-2-612.
7. Contractual arrangements relating to death, 91A-2-701.
8. General provisions, 91A-2-801 to 91A-2-803.
9. Custody and deposit of wills, 91A-2-901, 91A-2-902.

Part 1—Intestate Succession

Section

- 91A-2-101. Intestate estate.
91A-2-102. Share of spouse.
91A-2-103. Share of heirs other than surviving spouse.
91A-2-104. Requirement that heir survive decedent for one hundred twenty (120) hours.
91A-2-105. No taker.
91A-2-106. Representation.
91A-2-107. Kindred of half blood.
91A-2-108. Afterborn heirs.
91A-2-109. Meaning of child and related terms.
91A-2-110. Advancements.
91A-2-111. Alienage.
91A-2-112. Dower and curtesy abolished.

EDITORIAL BOARD COMMENT

Part 1 of [Chapter 2] contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personalty, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.

A principal purpose of this [chapter] and [Chapter 3] of the code is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law. For a discussion of this important aspect of the code, see 3 Real Property, Probate and Trust Journal (Fall 1968) p. 199.

The principal features of Part 1 are:

(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue or parent.

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive the decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were

rare. The statute provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be borne in mind that the decedent may always choose a different rule by executing a will.

91A-2-101. Intestate estate. Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code.

History: En. 91A-2-101 by Sec. 1, Ch. 365, L. 1974.

91A-2-102. Share of spouse. The intestate share of the surviving spouse is:

- (1) if there is no surviving issue, the entire intestate estate;
- (2) if there are surviving issue all of whom are issue of the surviving spouse also, the first fifty thousand dollars (\$50,000), plus one-half ($\frac{1}{2}$) of the balance of the intestate estate;
- (3) if there are surviving issue one (1) or more of whom are not issue of the surviving spouse, one-half ($\frac{1}{2}$) of the intestate estate.

History: En. 91A-2-102 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment omitted a subdivision reading as follows: "if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000] plus one-half of the balance of the intestate estate."

Editorial Board Comment

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse

when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-third under Part 2 of this [chapter]. Moreover, in the small estate (less than \$50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children.

See section [91A-2-802] for the definition of spouse which controls for purposes of intestate succession.

91A-2-103. Share of heirs other than surviving spouse. The part of the intestate estate not passing to the surviving spouse under section 91A-2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

- (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
- (2) if there is no surviving issue, to his parent or parents equally;
- (3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;

(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;

(5) if there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, the estate passes to the next of kin, in equal degree, except that where there are two (2) or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearer ancestors must be preferred to those claiming through an ancestor more remote.

History: En. 91A-2-103 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

Subdivision (5) of this section is not part of the corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Editorial Board Comment

This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandpar-

ents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

In general the principle of representation (which is defined in section [91A-2-106]) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under section [91A-2-801].

91A-2-104. Requirement that heir survive decedent for one hundred twenty (120) hours. Any person who fails to survive the decedent by one hundred twenty (120) hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by one hundred twenty (120) hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under section 91A-2-105.

History: En. 91A-2-104 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died

otherwise than simultaneously. [The Uniform Simultaneous Death Act, sections 91-423 to 91-430, is repealed effective July 1, 1975.] This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see section [91A-2-601]. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate

because sections [91A-3-302 and 91A-3-307] prevent informal probate of a will or informal issuance of letters for a period of five days from death. The last sentence prevents the survivorship requirement from affecting inheritances by the last eligible relative of the intestate who survives him for any period.

I.R.C. § 2056(b) (3) makes it clear that an interest passing to a surviving spouse is not made a "terminable interest" and thereby disqualified for inclusion in the marital deduction by its being conditioned on failure of the spouse to survive a period not exceeding six months after the

decedent's death, if the spouse in fact lives for the required period. Thus, the intestate share of a spouse who survives the decedent by five days is available for the marital deduction. To assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will. The marital deduction is not a problem in the typical intestate estate. The draftsmen and Special Committee concluded that the statute should accommodate the typical estate to which it applies, rather than the unusual case of an unplanned estate involving large sums of money.

91A-2-105. No taker. If there is no taker under the provisions of sections 91A-2-102 and 91A-2-103 the intestate estate passes to the state of Montana.

History: En. 91A-2-105 by Sec. 1, Ch. 365, L. 1974.

91A-2-106. Representation. If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one (1) share and the share of each deceased person in the same degree being divided among his issue in the same manner.

History: En. 91A-2-106 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Under the system of intestate succession in effect in some states, property is directed to be divided "per stirpes" among issue or descendants of identified ancestors. Applying a meaning commonly associated with the quoted words, the estate is first divided into the number indicated by the number of children of the ancestor who survive, or who leave issue who survive. If, for example, the property is directed to issue "per stirpes" of the intestate's parents, the first division would be by the number of children of parents (other than the intestate) who left issue surviving even though no person of this genera-

tion survives. Thus, if the survivors are a child and a grandchild of a deceased brother of the intestate and five children of his deceased sister, the brother's descendants would divide one-half and the five children of the sister would divide the other half. Yet, if the parent of the brother's grandchild also had survived, most statutes would give the seven nephews and nieces equal shares because it is commonly provided that if all surviving kin are in equal degree, they take per capita.

The draft rejects this pattern and keys to a system which assures that the first and principal division of the estate will be with reference to a generation which includes one or more living members.

91A-2-107. Kindred of half blood. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

History: En. 91A-2-107 by Sec. 1, Ch. 365, L. 1974.

91A-2-108. Afterborn heirs. Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

History: En. 91A-2-108 by Sec. 1, Ch. 365, L. 1974.

91A-2-109. Meaning of child and related terms. If, for the purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

- (1) An adopted person shall inherit as the child of an adopting parent.
- (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
 - (a) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
 - (b) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (b) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

History: En. 91A-2-109 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The definition of "child" and "parent" in section [91A-1-201] incorporates the

meanings established by this section, thus extending them for all purposes of the code. See section [91A-2-802] for the definition of "spouse" for purposes of intestate succession.

91A-2-110. Advancements. If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

History: En. 91A-2-110 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift be an advancement. The statute is phrased in terms of the donee being an "heir" because the transaction is regarded as of decedent's death; of course, the donee is only a prospective heir at the time of the transfer during lifetime. Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan.

If the donor intends that any transfer during lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present section. The present section applies only when the decedent died intestate and not when he leaves a will.

This section applies to advances to collaterals (such as nephews and nieces) as well as to lineal descendants. The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation.

91A-2-111. Alienage. No person is disqualified to take as an heir because he or a person through whom he claims is an alien unless the country in which he resides does not allow reciprocity.

History: En. 91A-2-111 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as adopted by the

National Conference of Commissioners is designated as section 2-112; the Montana enactment omitted section 2-111 of the Uniform Probate Code pertaining to debts owed to the decedent.

Editorial Board Comment

The purpose of this section is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the code that distinctions between real and personal property should be abolished.

This section has broader vitality in light of the recent decision of the United States Supreme Court in *Zschemig v. Miller* (1968) 389 U.S. 429, 19 L.Ed.2d 683, 88 S.Ct. 664, holding unconstitutional a state

statute providing for escheat if a nonresident alien cannot meet three requirements: the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country, the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of the local estate without confiscation by the foreign government. The rationale was that such a statute involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a governing treaty with the foreign country. Hence, the statute is "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."

91A-2-112. Dower and curtesy abolished. The estates of dower and curtesy are abolished.

History: En. 91A-2-112 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners is designated as section 2-113.

Editorial Board Comment

The provisions of this code replaced the common-law concepts of dower and curtesy and their statutory counterparts. Those estates provided both a share in intestacy and a protection against disinheritance.

* * *

Part 2—Elective Share of Surviving Spouse

Section

- 91A-2-201. Right to elective share.
- 91A-2-202. Augmented estate.
- 91A-2-203. Right of election personal to surviving spouse.
- 91A-2-204. Waiver of right to elect and of other rights.
- 91A-2-205. Proceeding for elective share—time limit.
- 91A-2-206. Effect of election on benefits by will or statute.
- 91A-2-207. Charging spouse with property received—liability of others for balance of elective share.

EDITORIAL BOARD COMMENT

The sections of this part describe a system for common-law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a "fair share" of the decedent's estate. Optional sections adapting the elective share system to community property jurisdictions were contained in preliminary drafts, but were dropped from the final code. Problems of disinheritance of spouses in community states are limited to situations involving assets acquired by domiciliaries of common-law states who later become domiciliaries of a community property state, and to instances where substantially all of a deceased spouse's property is separate property. Representatives of community property states differ in regard to whether either of these problem areas warrant statutory solution.

Almost every feature of the system described herein is or may be controversial. Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. See Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem," 33 Chi.L.Rev. 681 (1966). Still, all common-law states except the Dakotas appear to impose some restriction on the power of a spouse to disinherit the other. In some, the ancient concept of dower continues to prevent free transfer of land by a married person. In most states, including many which

have abolished dower, a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to be "illusory" or to be in "fraud" of the spouse's share have been evolved in some jurisdictions to offset the problems caused by will substitutes, and in New York and Pennsylvania, statutes have extended the elective share of a surviving spouse to certain nontestamentary transfers.

Questions relating to the proper size of a spouse's protected interest may be raised in addition to those concerning the need for, and method of assuring, any protection. The traditions in both common-law and community property states point toward some capital sum related to the size of the deceased spouse's holdings rather than to the needs of the surviving spouse. The community property pattern produces one-half for the surviving spouse, but is somewhat misleading as an analogy, for it takes no account of the decedent's separate property. The fraction of one-third, which is stated in section [91A-2-201], has the advantage of familiarity, for it is used in many forced-share statutes.

Although the system described herein may seem complex, it should not complicate administration of a married person's estate in any but very unusual cases. The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received. Some of the apparent complexity arises from section [91A-2-202], which has the effect of compelling an electing spouse to allow credit for all funds attributable to the decedent when the spouse, by electing, is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted. Finally, section [91A-2-204] expands the effectiveness of attempted waivers and releases of rights to claim an elective share. Thus, means by which estate planners can assure clients that their estates will not become embroiled in election litigation are provided.

Uniformity of law on the problems covered by this part is much to be desired. It is especially important that states limit the applicability of rules protecting spouses so that only estates of domiciliary decedents are involved.

91A-2-201. Right to elective share. (1) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third ($\frac{1}{3}$) of the augmented estate under the limitations and conditions hereinafter stated.

(2) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

History: En. 91A-2-201 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See section [91A-2-802] for the definition of "spouse" which controls in this part.

Under the common law a widow was entitled to dower, which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence the states have tended to substitute a forced share in the

whole estate for dower and the widower's comparable common-law right of curtesy. Few existing forced-share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 41 N.Y.U. L.Rev. 1037, 1050-1064 (1966). The existing law is discussed in MacDonald, *Fraud on the Widow's Share* (1960). Legislation comparable to that suggested here became effective in New York on Sept. 1, 1966. See Decedent Estate Law, § 18.

91A-2-202. Augmented estate. The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance,

family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(a) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(b) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(c) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(d) any transfer made within three (3) years of death of the decedent to the extent that the aggregate transfers to any one donee in any of the years exceed three thousand dollars (\$3,000).

(2) Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(3) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includable in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this subsection:

(a) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the federal social security system, by reason of service performed or disabilities incurred by the decedent, and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums

paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(b) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(c) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

History: En. 91A-2-202 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements. Thus essentially two separate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the one-third share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The fine-spun tests of the Federal Estate Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate ar-

rangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well planned or routine cases, however, because the spouse's rights are freely releasable under section [91A-2-204] and because of the time limits in section [91A-2-205]. Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision reading:

"A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise." In passing, it is to be noted that a

Pennsylvania widow apparently may claim against a revocable trust or will even though she has been amply provided for by life insurance or other means arranged by the decedent. Penn. Stats. Annot. Title 20, § 301.11(a).

The New York Estates, Powers and Trusts Law § 5-1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts causa mortis, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures. The scheme described by sections [91A-2-201] et seq. of this draft, like that of all states except New York, leaves the question of whether a spouse may or may not elect to be controlled by the economics of the situation, rather than by conditions on the statutory right. Further, the New York system gives the spouse election rights in spite of the possibility that the spouse has been well provided for by insurance or other gifts from the decedent.

91A-2-203. Right of election personal to surviving spouse. The right of election of the surviving spouse may be exercised only by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

History: En. 91A-2-203 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See section [91A-5-101] for definitions of protected person and protective proceedings.

91A-2-204. Waiver of right to elect and of other rights. The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each

spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

History: En. 91A-2-204 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The right to homestead allowance is conferred by section [91A-2-401], that to exempt property by section [91A-2-402], and that to family allowance by section [91A-2-403]. The right to renounce interests passing by testate or intestate succession is recognized by section [91A-2-801]. The provisions of this section, permitting a spouse or prospective spouse to

waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to ensure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

91A-2-205. Proceeding for elective share—time limit. (1) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within six (6) months after the first publication of notice to creditors for filing claims which arose before the death of the decedent, or within one year of the date of death, whichever time limitation first expires. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(2) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(3) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(4) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 91A-2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(5) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

History: En. 91A-2-205 by Sec. 1, Ch. 365, L. 1974.

91A-2-206. Effect of election on benefits by will or statute. (1) The surviving spouse's election of his elective share does not affect the share of

the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 91A-2-207(2), as if the surviving spouse had predeceased the testator.

(2) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share.

History: En. 91A-2-206 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The election does not result in a loss of

benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under sections [91A-2-201, 91A-2-202 and 91A-2-207(1)].

91A-2-207. Charging spouse with property received—liability of others for balance of elective share. (1) In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in section 91A-2-202(3), is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(2) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(3) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

History: En. 91A-2-207 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Sections [91A-2-401, 91A-2-402 and 91A-

2-403] have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

Part 3—Spouse and Children Unprovided For in Wills

Section

91A-2-301. Omitted spouse.

91A-2-302. Pretermitted children.

91A-2-301. Omitted spouse. (1) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) In satisfying a share provided by this section, the devises made by the will abate as provided in section 91A-3-902.

History: En. 91A-2-301 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Section [91A-2-508] provides that a will is not revoked by a change of circumstances occurring subsequent to its execution other than as described by that

section. This section reflects the view that the intestate share of the spouse is what the decedent would want the spouse to have if he had thought about the relationship of his old will to the new situation. The effect of this section should be to reduce the number of instances where a spouse will claim an elective share.

91A-2-302. Pretermitted children. (1) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

- (a) it appears from the will that the omission was intentional;
- (b) when the will was executed the testator had one (1) or more children and devised substantially all his estate to the other parent of the omitted child; or
- (c) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(3) In satisfying a share provided by this section, the devises made by the will abate as provided in section 91A-3-902.

History: En. 91A-2-302 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction ([sections 91A-2-110 and 91A-2-612]) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts or nonprobate transfers such as life insurance or joint accounts are in lieu of

a testamentary provision for a child born or adopted after the will. Here there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of [subdivision (1)(a)].

Under subsection [(3)] and section [91A-3-902], any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.

Part 4—Exempt Property and Allowances

Section

91A-2-401. Homestead allowance.

91A-2-402. Exempt property.

91A-2-403. Family allowance.

91A-2-404. Source, determination and documentation.

91A-2-405. Allowances and exempt property included in inheritance tax exemption.

EDITORIAL BOARD COMMENT

This part describes certain rights and values to which a surviving spouse and certain children of a deceased **domiciliary** are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the values described in this part, which total \$8,500 plus whatever is allowed to the spouse for support during administration, pass to the spouse. Minor or dependent children become entitled to the homestead exemption of \$5,000 and to support allowances if there is no spouse, and may receive some of the support allowance if they live apart from the surviving spouse. The exempt property section confers rights on the spouse, if any, or on all children, to \$3,500 in certain chattels, or funds if the unencumbered value of chattels is below the \$3,500 level. This provision is designed in part to relieve a personal representative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of [Chapter 3], Part 12.

States adopting the code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is relatively less need for uniformity of law regarding these provisions than is true of any of the other parts of this article. Still, it is quite important for all states to limit their homestead, allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Notice that section [91A-2-104] imposes a requirement of survival of the decedent for 120 hours on any spouse or child claiming under this part.

91A-2-401. Homestead allowance. (1) A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance as provided in sections 33-101 through 33-129, R. C. M. 1947. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance as provided in sections 33-101 through 33-129, R. C. M. 1947, divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

(2) If no homestead has been selected, designated and recorded prior to the decedent's death, the personal representative shall select, designate, set apart and cause to be recorded a homestead for the use of the surviving spouse and minor children and this section shall take effect as if the homestead had been declared before the decedent's death.

History: En. 91A-2-401 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

Subsection (2) of this section is not part of the corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Editorial Board Comment

See section [91A-2-802] for the definition of "spouse" which controls in this part. Also, see section [91A-2-104]. Waiver of homestead is covered by section [91A-

2-204]. "Election" between the provision of a will and homestead is covered by section [91A-2-206].

A set dollar amount for homestead allowance [\$5,000 in the official text] was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under section [91A-2-402]. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 12 of [Chapter 3] dealing with small es-

tates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allow-

ance may prefer a decedent's minor or dependent children over his other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the testator.

91A-2-402. Exempt property. In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding three thousand five hundred dollars (\$3,500) in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than three thousand five hundred dollars (\$3,500), or if there is not three thousand five hundred dollars (\$3,500) worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the three thousand five hundred dollars (\$3,500) value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

History: En. 91A-2-402 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Unlike the exempt values described in sections [91A-2-401 and 91A-2-403], the exempt values described in this section are available in a case where the decedent left no spouse but left only adult children. The possible difference between

beneficiaries of the exemptions described by sections [91A-2-401 and 91A-2-403], and this section, explain the provision in this section which establishes priorities.

Section [91A-2-204] covers waiver of exempt property rights, and section [91A-2-206] covers the question of whether a decedent's will may put a spouse to an election with reference to exemptions.

91A-2-403. Family allowance. In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one (1) year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

History: En. 91A-2-403 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The allowance provided by this section does not qualify for the marital deduction under the Federal Estate Tax Act because the interest is terminable. A broad code must provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly terminable or clearly nonterminable. With the proposed section clearly creating a terminable interest, estate planners can create a plan which will operate with certainty. Finally, in order to facilitate administration of this allowance without court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to

the family to meet current living expenses until the estate can be administered and assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate. If a husband has been the principal source of family support, a wife should not be expected to use her capital to support the family.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more than \$500 per month for one year; a court order would be necessary if a greater allowance is reasonably necessary.

91A-2-404. Source, determination and documentation. If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding six thousand dollars (\$6,000) or periodic installments not exceeding five hundred dollars (\$500) per month for one (1) year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

History: En. 91A-2-404 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See sections [91A-3-902, 91A-3-906 and 91A-3-907].

91A-2-405. Allowances and exempt property included in inheritance tax exemption. The allowances and exempt property provided for in sections 91A-2-401 through 91A-2-403 are to be included in computing the exemptions from inheritance tax provided for in section 91-4414 and are not in addition to such inheritance tax exemptions.

History: En. 91A-2-405 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Part 5—Wills

- Section
- 91A-2-501. Who may make a will.
 - 91A-2-502. Execution.
 - 91A-2-503. Holographic will.
 - 91A-2-504. Self-proved will.
 - 91A-2-505. Who may witness—effect of witness by beneficiary.
 - 91A-2-506. Choice of law as to execution.
 - 91A-2-507. Revocation by writing or by act.
 - 91A-2-508. Revocation by divorce or annulment—no revocation by other change in circumstances.
 - 91A-2-509. Revival of revoked will.
 - 91A-2-510. Incorporation by reference.
 - 91A-2-511. Testamentary additions to trusts.
 - 91A-2-512. Events of independent significance.
 - 91A-2-513. Separate writing identifying bequest of tangible property.

EDITORIAL BOARD COMMENT

Part 5 of [Chapter 2] deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum, holographic wills written and signed by the testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides for a more formal method of execution with acknowledgment before a public officer (the self-proved will).

91A-2-501. Who may make a will. Any person eighteen (18) or more years of age who is of sound mind may make a will.

History: En. 91A-2-501 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section states a uniform minimum

age of eighteen for capacity to execute a will. "Minor" is defined in section [91A-1-201], and may involve a different age than that prescribed here.

91A-2-502. Execution. Except as provided for holographic wills, writings within section 91A-2-513, and wills within section 91A-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two (2) persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

History: En. 91A-2-502 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses;

each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be

signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they

sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.
A will which does not meet these requirements may be valid under section [91A-2-503] as a holograph.

91A-2-503. Holographic will. A will which does not comply with section 91A-2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

History: En. 91A-2-503 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the "material provisions" to be in the testator's handwriting (rather than requiring,

as some existing statutes do, that the will be "entirely" in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate.

91A-2-504. Self-proved will. An attested will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this state, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF
COUNTY OF

We,, and, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age, of sound mind and under no constraint or undue influence.

.....
Testator
.....
Witness
.....
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____,

(SEAL) _____ (Signed) _____

(Official capacity of officer)

History: En. 91A-2-504 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

A self-proved will may be admitted to probate as provided in sections [91A-3-303, 91A-3-405 and 91A-3-406] without the testimony of any subscribing witness, but otherwise it is treated no differently than a will not self-proved. Thus, a self-proved will may be contested (except in regard

to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved. The significance of the procedural advantage for a self-proved will is limited to formal testacy proceedings because section [91A-3-303] dealing with informal probate dispenses with the necessity of testimony of witnesses even though the instrument is not self-proved under this section.

91A-2-505. Who may witness—effect of witness by beneficiary. (1)

Any person generally competent to be a witness may act as a witness to a will.

(2) A will is not invalid because the will is signed by an interested witness.

(3) All beneficial devises made in any will to a subscribing witness thereto, are void, unless there are two (2) other competent subscribing witnesses to the same; but a mere charge on the estate of the testator does not prevent his creditors from being competent witnesses to his will.

(4) If a witness, to whom any beneficial devise, void under the preceding section, is made, would have been entitled to any share of the estate of the testator if the testator had died intestate, such witness succeeds to so much of the share as would be distributed to him under intestate succession, not exceeding the devise or bequest made to him in the will.

History: En. 91A-2-505 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

Subsections (2) and (3) are not part of the corresponding section of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Editorial Board Comment

This section simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a mem-

ber of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

An interested witness is competent to testify to prove execution of the will, under section [91A-3-406].

91A-2-506. Choice of law as to execution. A written will is valid if executed in compliance with section 91A-2-502 or 91A-2-503 or if its execution complies with the law at the time of execution of the place where

the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

History: En. 91A-2-506 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of section [91A-2-502].

Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the court of this state

would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or if a national of Mexico executes a written will in this state which does not meet the requirements of section [91A-2-502] but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators. When the Uniform Probate Code is widely adopted, the impact of this section will become minimal.

A similar provision relating to choice of law as to revocation was considered but was not included. Revocation by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws.

91A-2-507. Revocation by writing or by act. A will or any part thereof is revoked

- (1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or
- (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

History: En. 91A-2-507 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the

document the determination of whether the act is a sufficient burning, tearing, canceling, obliteration or destruction and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each court is free to apply its own doctrine of dependent relative revocation.

The section does not affect present law in regard to the case of accidental destruction which is later confirmed by revocatory intention.

91A-2-508. Revocation by divorce or annulment—no revocation by other change in circumstances. If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power

or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of section 91A-2-802(2). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

History: En. 91A-2-508 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The section deals with what is sometimes called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operate to revoke the will; this is intended to change the rule in some states that subsequent marriage or marriage plus birth of issue operate to revoke a will. Of course, a specific devise may be adeemed by transfer of the property during the testator's lifetime except as otherwise provided in this code; although this is occasionally called revocation, it is not within the present section.

The provisions with regard to invalid divorce decrees parallel those in section [91A-2-802]. Neither this section nor [91A-2-802] includes "divorce from bed and board" as an event which affects devises or marital rights on death.

But see section [91A-2-204] providing that a complete property settlement entered into after or in anticipation of separation or divorce constitutes a renunciation of all benefits under a prior will, unless the settlement provides otherwise.

Although this section does not provide for revocation of a will by subsequent marriage of the testator, the spouse may be protected by section [91A-2-301] or an elective share under section [91A-2-201].

91A-2-509. Revival of revoked will. (1) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under section 91A-2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(2) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

History: En. 91A-2-509 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section adopts a limited revival doctrine. If testator executes will no. 1 and later executes will no. 2, there is a question as to whether testator intended to die intestate or have will no. 1 revived as his last will. Under this sec-

tion will no. 1 can be probated as testator's last will if his intent to that effect can be established. For this purpose testimony as to his statements at the time he revokes will no. 2 or at a later date can be admitted. If will no. 2 is revoked by a third will, will no. 1 would remain revoked except to the extent that will no. 3 showed an intent to have will no. 1 effective.

91A-2-510. Incorporation by reference. Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

History: En. 91A-2-510 by Sec. 1, Ch. 365, L. 1974.

91A-2-511. Testamentary additions to trusts. A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

History: En. 91A-2-511 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This is section 1 of the Uniform Testamentary Additions to Trusts Act.

91A-2-512. Events of independent significance. A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

History: En. 91A-2-512 by Sec. 1, Ch. 365, L. 1974.

91A-2-513. Separate writing identifying bequest of tangible property. Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

History: En. 91A-2-513 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his will to a separate document disposing of certain tangible personalty. The separate docu-

ment may be prepared after execution of the will, so would not come within section [91A-2-510] on incorporation by reference. It may even be altered from time to time. It need only be either in the testator's handwriting or signed by him. The typical case would be a list of personal effects and the persons whom the testator desired to take specified items.

Part 6—Rules of Construction

Section

- 91A-2-601. Requirement that devisee survive testator by one hundred twenty (120) hours.
- 91A-2-602. Choice of law as to meaning and effect of wills.
- 91A-2-603. Rules of construction and intention.
- 91A-2-604. Construction that will passes all property—after-acquired property.
- 91A-2-605. Anti-lapse—deceased devisee—class gift.
- 91A-2-606. Failure of testamentary provision.
- 91A-2-607. Change in securities—accessions—nonademption.
- 91A-2-608. Nonademption of specific devises in certain cases—sale by conservator—unpaid proceeds of sale, condemnation or insurance.
- 91A-2-609. Non-exoneration.
- 91A-2-610. Exercise of power of appointment.
- 91A-2-611. Construction of generic terms to accord with relationships as defined for intestate succession.
- 91A-2-612. Ademption by satisfaction.

EDITORIAL BOARD COMMENT

Part 6 deals with a variety of construction problems which commonly occur in wills. All of the "rules" set forth in this part yield to a contrary intent expressed in the will and are therefore merely presumptions. Some of the sections are found in all states, with some variation in wording; others are relatively new. The sections deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will, change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, exercise of power of appointment by general language in the will, and the kinds of persons deemed to be included within various class gifts which are expressed in terms of family relationships.

91A-2-601. Requirement that devisee survive testator by one hundred twenty (120) hours. A devisee who does not survive the testator by one hundred twenty (120) hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

History: En. 91A-2-601 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This parallels section [91A-2-104] requiring an heir to survive by 120 hours in order to inherit.

91A-2-602. Choice of law as to meaning and effect of wills. The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the public policy of this state otherwise applicable to the disposition.

History: En. 91A-2-602 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

New York Estates, Powers & Trusts Law Sec. 3-5.1(h) and Illinois Probate Act Sec. 896(b) direct respect for a testator's choice of local law with reference to personal and intangible property situated in the enacting state. This provision goes further and enables a testator to se-

lect the law of a particular state for purposes of interpreting his will without regard to the location of property covered thereby. So long as local public policy is accommodated, the section should be accepted as necessary and desirable to add to the utility of wills. Choice of law regarding formal validity of a will is in section [91A-2-506]. See also sections [91A-3-202 and 91A-3-408].

91A-2-603. Rules of construction and intention. The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

History: En. 91A-2-603 by Sec. 1, Ch. 365, L. 1974.

91A-2-604. Construction that will passes all property—after-acquired property. A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

History: En. 91A-2-604 by Sec. 1, Ch. 365, L. 1974.

91A-2-605. Anti-lapse—deceased devisee—class gift. If a devisee who is a grandparent or a lineal descendent of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by one hundred twenty (120) hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

History: En. 91A-2-605 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survives the testator. A relative is one related to the testator by kinship and is limited to those who can inherit under section [91A-2-103] (through grandparents); it does not include persons related by marriage. Issue includes adopted persons and illegitimates to the extent they would inherit from the devisee; see sections [91A-1-201 and 91A-2-109]. Note that the section is broader than some existing anti-lapse statutes which apply only to devises to children and other descendants, but is narrower than those which apply to devises to any person. The section

is expressly applicable to class gifts, thereby eliminating a frequent source of litigation. It also applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. This, though contrary to some decisions, seems justified. It still seems likely that the testator would want the issue of a person included in a class term but dead when the will is made to be treated like the issue of another member of the class who was alive at the time the will was executed but who died before the testator.

The five-day survival requirement stated in section [91A-2-601] does not require issue who would be substituted for their parent by this section to survive their parent by any set period.

Section [91A-2-106] describes the method of division when a taking by representation is directed by the code.

91A-2-606. Failure of testamentary provision. (1) Except as provided in section 91A-2-605 if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(2) Except as provided in section 91A-2-605 if the residue is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

History: En. 91A-2-606 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

If a devise fails by reason of lapse and the conditions of section [91A-2-605] are met, the latter section governs rather than

this section. There is also a special rule for renunciation contained in section [91A-2-801]; a renounced devise may be governed by either section [91A-2-605] or the present section, depending on the circumstances.

91A-2-607. Change in securities—accessions—nonademption. (1) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(a) as much of the devised securities as is a part of the estate at time of the testator's death;

(b) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity;

(c) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(d) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(2) Distributions prior to death with respect to a specifically devised security not provided for in subsection (1) are not part of the specific devise.

History: En. 91A-2-607 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Subsection [(2)] is intended to codify existing law to the effect that cash divi-

dends declared and payable as of a record date occurring before the testator's death do not pass as a part of the specific devise even though paid after death. See section 4, Revised Uniform Principal and Income Act [secs. 67-1901 et seq.].

91A-2-608. Nonademption of specific devises in certain cases—sale by conservator—unpaid proceeds of sale, condemnation or insurance. (1) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to pecuniary devise equal to so much of the sale price, condemnation award or insurance proceeds as remains in the estate and is identifiable at the time of the decedent's death.

This subsection does not apply if subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one (1) year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (2).

(2) A specific devisee has the right to the remaining specifically devised property and:

(a) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

(b) any amount of a condemnation award for the taking of the property unpaid at death;

(c) any proceeds unpaid at death on fire or casualty insurance on the property; and

(d) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

History: En. 91A-2-608 by Sec. 1, Ch. 365, L. 1974.

91A-2-609. Non-exoneration. A specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

History: En. 91A-2-609 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See section [91A-3-814] empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the

right of the specific devisee. The present section governs the substantive rights of the devisee. The common-law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

For the rule as to exempt property, see section [91A-2-402].

91A-2-610. Exercise of power of appointment. A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

History: En. 91A-2-610 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Although there is some indication that more states will adopt special legislation on powers of appointment, and this code has therefore generally avoided any provisions relating to powers of appointment, there is great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will. Although a substantial number of states have legislation to the effect that a will with a general residuary clause does manifest an intent to exercise a power, the contrary rule is stated in the present section for two reasons: (1)

this is still the majority rule in the United States, and (2) most powers of appointment are created in marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise the power.

Under this section and section [91A-2-603] the intent to exercise the power is effective if it is "indicated by the will." This wording permits a court to find the manifest intent if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express reference to the original creating instrument. In other words, the modern liberal rule on interpretation of the donee's will would be available.

91A-2-611. Construction of generic terms to accord with relationships as defined for intestate succession. Half bloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession.

History: En. 91A-2-611 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners adds at the end of the section: "but a person born out of wedlock is not treated as

the child of the father unless the person is openly and notoriously so treated by the father."

Editorial Board Comment

The purpose of this section is to facilitate a modern construction of gifts, usually class gifts, in wills.

91A-2-612. Ademption by satisfaction. Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

History: En. 91A-2-612 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section parallels section [91A-2-110] on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in distribution of an estate, whether testate or intestate. Although courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant. Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will is silent, the above section would require either the testator to declare in writing that the gift is an

advance or satisfaction or the devisee to acknowledge the same in writing. The second sentence on value accords with section [91A-2-110] and would apply if property such as stock is given. If the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable. If a devisee to whom an advancement is made predeceases the testator and his issue take under section [91A-2-605], they take the same devise as their ancestor; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as to his issue. In this respect the rule in testacy differs from that in intestacy; see section [91A-2-110].

Part 7—Contractual Arrangements Relating to Death

Section

91A-2-701. Contracts concerning succession.

91A-2-701. Contracts concerning succession. A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established only by

- (1) provisions of a will stating material provisions of the contract;
- (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
- (3) a writing signed by the decedent evidencing the contract.

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

History: En. 91A-2-701 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

It is the purpose of this section to tighten the methods by which contracts

concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a pre-

sumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of

the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

Part 8—General Provisions

Section

91A-2-801. Renunciation of succession.

91A-2-802. Effect of divorce, annulment and decree of separation.

91A-2-803. Effect of homicide on intestate succession, wills, joint assets, life insurance and beneficiary designations.

EDITORIAL BOARD COMMENT

Part 8 contains three general provisions which cut across both testate and intestate succession. The first section permits renunciation; the existing law in most states permits renunciation of gifts by will but not by intestate succession, a distinction which cannot be defended on policy grounds. The second section deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share. The last section, an optional provision, spells out the legal consequence of murder on the right of the murderer to take as heir, devisee, joint tenant or life insurance beneficiary.

91A-2-801. Renunciation of succession. (1) A person (or his personal representative) who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time and at the place hereinafter provided. The instrument shall

- (a) describe the property or part thereof or interest therein renounced,
- (b) be signed by the person renouncing, and
- (c) declare the renunciation and the extent thereof.

(2) The writing specified in (1) must be filed within six (6) months after the death of the decedent or the donee of the power, or if the taker of the property is not then finally ascertained not later than six (6) months after the event by which the taker or the interest is finally ascertained. The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. A copy of the writing also shall be mailed to the personal representative of the decedent.

(3) Unless the decedent or donee of the power has otherwise indicated by his will, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent, or if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(4) Any assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor, written waiver of the right to

renounce or any acceptance of property by an heir, devisee, person succeeding to a renounced interest, beneficiary or person designated to take pursuant to a power of appointment exercised by testamentary instrument, or sale or other disposition of property pursuant to judicial process, made before the expiration of the period in which he is permitted to renounce, bars the right to renounce as to the property.

(5) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(6) This section does not abridge the right of any person to assign, convey, release, or renounce any property arising under any other section of this code or other statute.

(7) Any interest in property which exists on the effective date of this section, but which has not then become indefeasibly fixed both in quality and quantity, or the taker of which has not then become finally ascertained, may be renounced after the effective date of this section as provided herein. An interest which has arisen prior to the effective date of this section in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section.

History: En. 91A-2-801 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is designed to facilitate renunciation in order to aid postmortem planning. Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share. There is no reason for such a distinction, and some states have already adopted legislation permitting renunciation of an intestate share. Renunciation may be made for a variety of reasons, including carrying out the decedent's wishes not expressed in a properly executed will.

Under the rule of this section, renounced property passes as if the renouncing person had failed to survive the decedent. In the case of intestate property, the heir who would be next in line in succession would take; often this will be the issue of the renouncing person,

taking by representation. For consistency the same rule is adopted for renunciation by a devisee; if the devisee is a relative who leaves issue surviving the testator, the issue will take under section [91A-2-605]; otherwise disposition will be governed by section [91A-2-606] and general rules of law.

The section limits renunciation to six months after the death of the decedent or if the taker of the property is not ascertained at that time, then six months after he is ascertained. If the personal representative is concerned about closing the estate within that six months' period in order to make distribution, he can obtain a waiver of the right to renounce. Normally this should be no problem, since the heir or devisee cannot renounce once he has taken possession of the property.

The presence of a spendthrift clause does not prevent renunciation under this section.

91A-2-802. Effect of divorce, annulment and decree of separation. (1) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(2) For purposes of sections 91A-2-101 through 91A-2-404 and of 91A-3-203, a surviving spouse does not include:

(a) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree

or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;

(b) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or

(c) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

History: En. 91A-2-802 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See section [91A-2-508] for similar provisions relating to the effect of divorce to revoke devises to a spouse.

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce. Subsection [(1)] states an obvious proposition, but subsection [(2)] deals with the difficult prob-

lem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under section [91A-2-204] as a renunciation of benefits under a prior will and by intestate succession.

91A-2-803. Effect of homicide on intestate succession, wills, joint assets, life insurance and beneficiary designations. (1) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(2) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(3) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(4) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(5) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(6) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired

except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

History: En. 91A-2-803 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

* * *

A growing group of states have enacted statutes dealing with the problems covered by this section, and uniformity appears desirable. The section is confined to intentional and felonious homicide and excludes the accidental manslaughter killing.

At first it may appear that the matter dealt with is criminal in nature and not a proper matter for probate courts. However, the concept that a wrongdoer may not profit by his own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to property of the decedent. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the murdered per-

son's family under wrongful death statutes. While conviction in the criminal prosecution under this section treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding. In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.

Part 9—Custody and Deposit of Wills

Section

91A-2-901. Deposit of will with court for safekeeping.

91A-2-902. Duty of custodian of will—liability.

91A-2-901. Deposit of will with court for safekeeping. A will may be deposited by the testator or his agent with any court for safekeeping, under rules of the court. The will shall be kept confidential. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible, and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to him on request; or the court may deliver the will to the appropriate court.

History: En. 91A-2-901 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Many states already have statutes permitting deposit of wills during a testator's lifetime. Most of these statutes have elaborate provisions governing purely administrative matters: how the will is to be enclosed in a sealed wrapper, what is to be endorsed on the wrapper, the

form of receipt or certificate given to the testator, the fee to be charged, how the will is to be opened after testator's death and who is to be notified. Under this section, details have been left to court rule, except as other relevant statutes such as one governing fees may apply.

It is, of course, vital to maintain the confidential nature of deposited wills. However, this obviously does not prevent

the opening of the will after the death of the testator if necessary in order to determine the executor or other interested persons to be notified. Nor should it prevent opening the will to microfilm for confidential record storage, for example. These matters could again be regulated by court rule.

It is suggested that in the near future it may be desirable to develop a central filing system regarding the presence of deposited wills, because the mobility of our modern population makes it probable

that the testator will not die in the county where his will is deposited. Thus a statute might require that the local registrar notify an appropriate official, that the will is on file; the state official would in effect provide a clearinghouse for information on location of deposited wills without disrupting the local administration.

The provision permitting examination of a will of a protected person by the conservator supplements section [91A-5-427].

91A-2-902. Duty of custodian of will—liability. After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court. Any person who willfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who willfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

History: En. 91A-2-902 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Model Probate Code Section 63, slightly changed. A person authorized by a court

to accept delivery of a will from a custodian may, in addition to a registrar or clerk, be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

CHAPTER 3

PROBATE OF WILLS AND ADMINISTRATION

Part

1. General provisions, 91A-3-101 to 91A-3-109.
2. Venue for probate and administration—priority to administer—demand for notice, 91A-3-201 to 91A-3-204.
3. Informal probate and appointment proceedings, 91A-3-301 to 91A-3-311.
4. Formal testacy and appointment proceedings, 91A-3-401 to 91A-3-414.
5. Supervised administration, 91A-3-501 to 91A-3-505.
6. Personal representative—appointment, control and termination of authority, 91A-3-601 to 91A-3-618.
7. Duties and powers of personal representatives, 91A-3-701 to 91A-3-722.
8. Creditors' claims, 91A-3-801 to 91A-3-816.
9. Special provisions relating to distribution, 91A-3-901 to 91A-3-916.
10. Closing estates, 91A-3-1001 to 91A-3-1010.
11. Compromise of controversies, 91A-3-1101, 91A-3-1102.
12. Procedure for collection of personal property by affidavit, termination of joint tenancies and life estates, and summary administration procedure for small estates, 91A-3-1201 to 91A-3-1205.

Part 1—General Provisions

Section

- 91A-3-101. Devolution of estate at death—restrictions.
- 91A-3-102. Necessity of order of probate for will.
- 91A-3-103. Necessity of appointment for administration.
- 91A-3-104. Claims against decedent—necessity of administration.
- 91A-3-105. Proceedings affecting devolution and administration—jurisdiction of subject matter.
- 91A-3-106. Proceedings within exclusive jurisdiction of court.

GENERAL PROVISIONS

- 91A-3-107. Scope of proceedings—proceedings independent—exception.
91A-3-108. Probate, testacy and appointment proceedings—time limit—exception.
91A-3-109. Statutes of limitation on decedent's cause of action.

EDITORIAL BOARD COMMENT

The provisions of this [chapter] describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the re-drafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither is compelled, however, but both are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a nonadjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five-day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by nonclaim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

91A-3-101. Devolution of estate at death—restrictions. The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

History: En. 91A-3-101 by Sec. 1, Ch. 365, L. 1974.

91A-3-102. Necessity of order of probate for will. Except as provided in section 91A-3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the clerk, or an adjudication of probate by the court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no court proceeding concerning the succession or administration of the estate has occurred, and

(2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

History: En. 91A-3-102 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The basic idea of this section follows Section 85 of the Model Probate Code. The exception referring to section [91A-3-1201] relates to affidavit procedures which are authorized for collection of estates worth less than \$5,000.

Section [91A-3-107] and various sections in Parts 3 and 4 of this [chapter] make it clear that a will may be probated without appointment of a personal repre-

sentative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in [section 91A-3-108] mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the de-

cedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with reference to the estate they claim, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

91A-3-103. Necessity of appointment for administration. Except as otherwise provided in sections 91A-4-101 through 91A-4-401, inclusive, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or clerk, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

History: En. 91A-3-103 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in section [91A-3-601]. "Letters" are the subject of section [91A-1-305]. Section [91A-3-701] is also related, since it deals with the time of accrual of

duties and powers of personal representatives.

See [section 91A-3-108] for the time limit on requests for appointment of personal representatives.

In [Chapter 4, sections 91A-4-201 and 91A-4-207] permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of his authority with a local court.

91A-3-104. Claims against decedent—necessity of administration. No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by sections 91A-3-101 through 91A-3-1203. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 91A-3-1005 or from a former personal representative individually liable as provided in section 91A-3-1006. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

History: En. 91A-3-104 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This and sections of Part 8 [Chapter 3], are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (section [91A-3-301]). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (section

[91A-3-203]). But, if a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under [sections 91A-3-807 or 91A-3-1003] has been breached. The methods for closing estates are outlined in sections [91A-3-1001 through 91A-3-1003]. Termination of appointment under sections [91A-3-608 et seq.] may occur though the estate is **not** closed and so may be irrelevant to the question of whether creditors may pursue distributees.

91A-3-105. Proceedings affecting devolution and administration—jurisdiction of subject matter. Persons interested in decedents' estate may apply to the clerk for determination in the informal proceedings provided in sections 91A-3-301 through 91A-3-311 of this act, and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in sections 91A-3-401 through 91A-3-505 of this act. The district court has exclusive jurisdiction of all probate matters.

History: En. 91A-3-105 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners substitutes for the second sentence in the section, above, two sentences as follows: "The court has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent."

Editorial Board Comment

This and other sections of [Chapter 3] contemplate a nonjudicial officer who will act on informal application and a judge who will hear and decide formal petitions. See section [91A-1-307] which permits the judge to perform or delegate the functions of the [clerk]. However, the primary purpose of [Chapter 3] is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or

county. Hence, any of several alternatives to the organizational scheme assumed for purposes of this draft would be acceptable.

For example, a state might assign responsibility for maintenance of probate files and records, and for receiving and acting upon informal applications, to existing, limited power probate offices. Responsibility for hearing and deciding formal petitions would then be assigned to the court of general jurisdiction of each county or district.

If separate courts or officers are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of this draft.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad statement of concurrent jurisdiction of this section. However, if a more specialized "estates" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials, even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although

the alternative of permitting the estates court to empanel juries where necessary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" court in regard to negligence litigation would only be concurrent with that of the general trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters

relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the Comment to the next section regarding adjustments which might be made in the code by a state with a single court of general jurisdiction for each county or district.

91A-3-106. Proceedings within exclusive jurisdiction of court. In proceedings within the exclusive jurisdiction of the court where notice is required by this code or by rule, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with section 91A-1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

History: En. 91A-3-106 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The language in this and the preceding section which divides matters coming before the probate court between those within the court's "exclusive" jurisdiction and those within its "concurrent" jurisdiction would be inappropriate if probate matters were assigned to a branch of a single court of general jurisdiction. [See Compiler's Notes following section 91A-3-105.] The code could be adjusted to an assumption of a single court in various ways. Any adjusted version should contain a provision permitting the court to hear and settle certain kinds of matters after notice as provided in [91A-1-401]. It might be suitable to combine the second sentences of [91A-1-305] and [91A-1-306] into a single section as follows:

"The court may hear and determine formal proceedings involving administra-

tion and distribution of decedents' estates after notice to interested persons in conformity with Section 1-401. Persons notified are bound though less than all interested persons may have been given notice."

An adjusted version also might provide:

"Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the court (meaning the probate division) may hear and determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party."

The propriety of this sort of statement would depend upon whether questions of docketing and assignment, including the division of matters between co-ordinate branches of the court, should be dealt with by legislation.

91A-3-107. Scope of proceedings—proceedings independent—exception. Unless supervised administration as described in sections 91A-3-501 through 91A-3-505 is involved, (1) each proceeding before the court or clerk is independent of any other proceeding involving the same estate;

(2) petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this code, no petition is defective because it fails to embrace all matters which might then be the subject of a final order;

(3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and

(4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

History: En. 91A-3-107 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section and others in [Chapter 3] describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections [91A-3-501 through 91A-3-505] describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons

concerned with the relief sought), informal proceedings (request for the limited response that nonjudicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining parts of [Chapter 3] to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by sections [91A-3-106 and 91A-3-602]. [Section 91A-3-201] locates venue for all proceedings at the place where the first proceeding occurred.

91A-3-108. Probate, testacy and appointment proceedings—time limit—exception. No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three (3) years after the decedent's death, except (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three (3) years after the conservator becomes able to establish the death of the protected person; and

(3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve (12) months from the informal probate or three (3) years from the decedent's death.

These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate, nor do they limit the right of interested persons to commence informal probate or appointment proceedings or formal testacy or appointment proceedings at any time after three (3) years from the decedent's death if there have been no previous formal or informal probate or appointment proceedings commenced in respect of that decedent. In cases under (1) or (2) above, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this code which relate to the date of death.

History: En. 91A-3-108 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The next to last sentence in the corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners reads as follows: "These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate."

Editorial Board Comment

This section establishes a basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate. But, an exception assures that heirs will have at least one year after an informal probate to initiate a contest and to secure administration of the estate as intestate.

If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs or devisees can protect themselves against change within the three years of assumption concerning whether the decedent left a will or died intestate by bringing a formal proceeding shortening the period to that described in sections [91A-3-412 and 91A-3-413].

A personal representative who has been appointed under an assumption concerning testacy which may be reversed in the three-year period if there has been no formal proceeding, is protected by section [91A-3-703]. It relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration. Distributees who receive an estate distributed before the three-year period expires where there has been no formal determination accelerating the time for certainty, remain potentially

liable to persons determined to be entitled by formal proceedings instituted within the basic period under sections [91A-3-909 and 91A-3-1007].

Purchasers from personal representatives and distributees may be protected without regard to whether the three-year period has run. See sections [91A-3-713 and 91A-3-910].

All creditors' claims are barred after three years from death. See section [91A-3-803(1)(b)]. Because of this, and since any possibility that letters may be issued at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under [91A-3-101], the three-year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of Model Probate Code. A qualification covers the situation where a closed administration is sought to be reopened to administer after-discovered assets. See section [91A-3-1009]. If there has been no probate or appointment within three years, and if either exception to section [91A-3-102] applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration, discover assets after the three-year period has run. Such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it.

91A-3-109. Statutes of limitation on decedent's cause of action. No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than four (4) months after death. A cause of action which, but for this section, would have been barred less than four (4) months after death, is barred after four (4) months unless tolled.

History: En. 91A-3-109 by Sec. 1, Ch. 365, L. 1974.

**Part 2—Venue for Probate and Administration—Priority to Administer—
Demand for Notice**

Section

- 91A-3-201. Venue for first and subsequent estate proceedings—location of property.
 91A-3-202. Appointment or testacy proceedings—conflicting claim of domicile in another state.
 91A-3-203. Priority among persons seeking appointment as personal representative.
 91A-3-204. Demand for notice of order or filing concerning decedent's estate.

91A-3-201. Venue for first and subsequent estate proceedings—location of property. (1) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(a) in the county where the decedent had his domicile at the time of his death; or

(b) if the decedent was not domiciled in this state, in any county where property of the decedent was located at the time of his death.

(2) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in section 91A-1-303 or (3) of this section.

(3) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(4) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

History: En. 91A-3-201 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Sections [91A-1-303 and 91A-3-201] cover the subject of venue for estate proceedings. Sections [91A-3-202, 91A-3-301, 91A-3-303 and 91A-3-309] also may be relevant.

Provisions for transfer of venue appear in section [91A-1-303].

The interplay of these several sections may be illustrated best by examples:

(1) A formal probate or appointment proceeding is initiated in A County. Interested persons who believe that venue is in B County rather than A County must raise their question about venue in A County, because [91A-1-303] gives the court in which the proceeding is first commenced authority to resolve disputes over venue. If the court in A County erroneously determines that it has venue, the remedy is by appeal.

(2) An informal probate or appointment application is filed and granted without notice in A County. If interested persons wish to challenge the registrar's determination of venue, they may not simply file a formal proceeding in the county of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their county [section 91A-3-201(2)] locates the venue of any subsequent proceeding where the first proceeding occurred. The function of [subsection (2)] is obvious when one thinks of subsequent proceedings as those which relate to claims, or accounts, or to efforts to control a personal representative. It is less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal application. Still, the applicant seeking an informal order must be careful about the statements he makes in his application because he may be charged with perjury under section

[91A-1-309] if he is deliberately inaccurate. Moreover, the registrar must be satisfied that the allegations in the application support a finding of venue. [Section 91A-3-201(3)] provides a remedy for one who is upset about the venue-locating impact of a prior order in an informal proceeding and who does not wish to engage in full litigation about venue in the forum chosen by the other interested person unless he is forced to do so. Using it, he may succeed in getting the A County court to transfer the proceedings to the county of his choice. He would be well advised to initiate formal proceedings if he gets the chance, for if he relies on informal proceedings, he, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

(3) If the decedent's domicile was not in the state, venue is proper under [sections 91A-3-201 and 91A-1-303] in any county where he had assets.

One contemplating starting administration because of the presence of local assets should have several other sections of the code in mind. First, by use of the recognition provisions in [chapter 4], it may be possible to avoid administration in any state other than that in which the decedent was domiciled. Second, section [91A-3-203] may apply to give priority for local appointment to the representative appointed at domicile. Third, under section [91A-3-309], informal appointment proceedings in this state will be dismissed if it is known that a personal representative has been previously appointed at domicile.

91A-3-202. Appointment or testacy proceedings—conflicting claim of domicile in another state. If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.

History: En. 91A-3-202 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is designed to reduce the possibility that conflicting findings of domicile in two or more states may result in inconsistent administration and distribution of parts of the same estate. Section [91A-3-408] dealing with the effect of adjudications in other states concerning testacy supports the same general purpose to use domiciliary law to unify succession of property located in different states.

Whether testate or intestate, succession should follow the presumed wishes of the decedent whenever possible. Unless a decedent leaves a separate will for the portion of his estate located in each different state, it is highly unlikely that he would want different portions of his estate subject to different rules simply because courts reach conflicting conclusions concerning his domicile. It is pointless to debate whether he would prefer one or the other of the conflicting rules, when the paramount inference is that the decedent would prefer that his estate be unified under either rule rather than wasted in litigation.

The section adds very little to existing law. If a previous estate proceeding in State A has determined that the decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of res judicata or collateral estoppel (and full faith and credit) from relitigating the issue of domicile in a later proceeding in State B. Probably, it would not matter in this setting that domicile was a jurisdictional fact. *Stoll v. Gottlieb* (1938) 305 U.S. 165, 83 L.Ed. 104, 59 S.Ct. 134. Even if the parties to a present proceeding were not personally before the court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to property subject to the power of the courts in A, on persons to whom due notice of the proceeding was given. *Riley v. New York Trust Co.* (1942) 315 U.S. 343, 86 L.Ed. 885, 62 S.Ct. 608; *Mullane v. Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652.

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to

lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that he can preserve his ability to litigate contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to particular litigants should be subordinated to the decedent's probable wish that his estate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of his choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

It is to be noted, in this connection, that the local suitor always will have a chance to contest the question of domicile in the other state. His locally initiated proceedings may proceed to a valid judgment accepting his theory of the case unless parties who would oppose him appear and defend on the theory that the domicile question is currently being litigated elsewhere. If the litigation in the other state has proceeded to judgment, section [91A-3-408] rather than the instant section will govern. If this section applies, it will mean that the foreign proceedings are still pending, so that the local person's contention concerning domicile can be made therein even though until the defense of litigation elsewhere is offered in the local proceedings, he may not have been notified of the foreign proceeding.

91A-3-203. Priority among persons seeking appointment as personal representative. (1) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(a) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(b) the surviving spouse of the decedent who is a devisee of the decedent;

(c) other devisees of the decedent;

(d) the surviving spouse of the decedent;

(e) other heirs of the decedent;

(f) public administrator;

(g) forty-five (45) days after the death of the decedent, any creditor.

(2) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (1) apply except that

(a) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;

(b) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value, or, in default of this accord any suitable person.

(3) A person entitled to letters under (b) through (e) of (1) above, may nominate a qualified person to act as personal representative. Any person entitled to letters may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When two (2) or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment.

(4) Conservators of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(5) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(6) No person is qualified to serve as a personal representative who is:

(a) under the age of eighteen (18);

(b) a person whom the court finds unsuitable in formal proceedings.

(7) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(8) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by [section 91A-1-201 (21)] to include fiduciaries. Also [sections 91A-1-403(2) and 91A-3-912] show a purpose to make trustees serve as representatives of all beneficiaries. The provision in [(4)] is consistent.

If a state's statutes recognize a public administrator or public trustee as the ap-

propriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this section the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of [section 91A-2-105].

Subsection [(7)] was inserted in connection with the decision to abandon the effort to describe ancillary administration in [chapter 4]. Other provisions in [chapter 3] which are relevant to administration of assets in a state other than that of the decedent's domicile are [section 91A-1-301] (territorial effect), [section 91A-3-201] (venue), [section 91A-3-308] (informal appointment for nonresident decedent delayed thirty days), [section 91A-3-309] (no informal appointment here if a representative has been appointed at domicile), [section 91A-3-815] (duty of personal representative where administration in more than one state) and [sections 91A-4-201 through 91A-4-205] (local recognition of foreign personal representatives).

91A-3-204. Demand for notice of order or filing concerning decedent's estate. Any person desiring notice of any order or filing pertaining to a

decedent's estate in which he has a financial or property interest, may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in section 91A-1-401 to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

History: En. 91A-3-204 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The notice required as the result of demand under this section is regulated

as far as time and manner requirements are concerned by section [91A-1-401].

This section would apply to any order which might be made in a supervised administration proceeding.

Part 3—Informal Probate and Appointment Proceedings

Section

- 91A-3-301. Informal probate or appointment proceedings—application—contents.
- 91A-3-302. Informal probate—duty of clerk of court—effect of informal.
- 91A-3-303. Informal probate—proof and findings required.
- 91A-3-304. Informal probate unavailable in certain cases.
- 91A-3-305. Informal probate—clerk not satisfied.
- 91A-3-306. Informal probate—notice requirements.
- 91A-3-307. Informal appointment proceedings—delay in order—duty of clerk—effect of appointment.
- 91A-3-308. Informal appointment proceedings—proof and findings required.
- 91A-3-309. Informal appointment proceedings—clerk not satisfied.
- 91A-3-310. Informal appointment proceedings—notice requirements.
- 91A-3-311. Informal appointment proceedings—unavailable in certain cases.

91A-3-301. Informal probate or appointment proceedings—application—contents. Applications for informal probate or informal appointment shall be directed to the clerk, and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the following information:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special, ancillary or successor representative, shall contain the following:

- (a) a statement of the interest of the applicant;
- (b) the name and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(c) if the decedent was not domiciled in the state at the time of his death, a statement showing venue;

(d) a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;

(e) a statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere.

(2) An application for informal probate of a will shall state the following in addition to the statements required by (1):

(a) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(b) that the applicant, to the best of his knowledge, believes the will to have been validly executed;

(c) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will;

(d) that the time limit for informal probate as provided in this article has not expired either because three (3) years or less have passed since the decedent's death, or, if more than three (3) years from death have passed, that circumstances as described by section 91A-3-108 authorizing tardy probate have occurred.

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

(4) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by (1):

(a) that after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this state under section 91A-1-301, or, a statement why any such instrument of which he may be aware is not being probated;

(b) the priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 91A-3-203.

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 91A-3-610(3), or whose appointment has been terminated

by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

History: En. 91A-3-301 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately

false representation is made, remedies for fraud will be available to injured persons without specified time limit (see [Chapter 1]). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section [91A-1-309] deals with verification.

91A-3-302. Informal probate—duty of clerk of court—effect of informal. Upon receipt of an application requesting informal probate of a will, the clerk, upon making the findings required by section 91A-3-303 shall issue a written statement of informal probate if at least one hundred twenty (120) hours have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

History: En. 91A-3-302 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Model Probate Code Sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This "umbrella" section and the sections it refers to describe an alternative procedure called "informal probate." It is a statement of probate by the [clerk]. A succeeding section describes cases in which informal probate is to be denied.

"Informal probate" is subjected to safeguards which seem appropriate to a transaction which has the effect of making a will operative and which **may** be the only official reaction concerning its validity. "Informal probate," it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in **truly** judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

91A-3-303. Informal probate—proof and findings required. (1) In an informal proceeding for original probate of a will, the clerk shall determine whether:

- (a) the application is complete;
- (b) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (c) the applicant appears from the application to be an interested person as defined in section 91A-1-201(21);
- (d) on the basis of the statements in the application, venue is proper;
- (e) an original, duly executed and apparently unrevoked will is in the clerk's possession;
- (f) any notice required by section 91A-3-204 has been given and that the application is not within section 91A-3-304; and

(g) it appears from the application that the time limit for original probate has not expired.

(2) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or except as provided in subsection (4) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(3) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under sections 91A-2-502, 91A-2-503 or 91A-2-506 have been met and that it is self-proved as provided by section 91A-2-504 shall be probated without further proof. In other cases the clerk shall admit the will to probate on the following proof:

(a) on the testimony of one of the subscribing witnesses that the will was executed as required by this code and that the testator was of sound mind at the time of its execution;

(b) if it appears at the time of the filing of the application to have the will informally admitted to probate that none of the subscribing witnesses reside in the county or are capable of appearing and that the sworn or affirmed statement of one of the witnesses to the will has been taken or can be taken within the state within the next ten (10) days, the clerk shall admit the will to probate on the sworn or affirmed written statement of such witness that he has examined the original or a photostatic copy of the will, that he recognizes it as the will of the decedent witnessed by him on the date stated, that the will was executed in all particulars as required by law and that the testator was of sound mind at the time;

(c) if none of the subscribing witnesses reside in the county and are capable of testifying at the time of the application for informal probate and the execution of the will cannot be proved under either of the foregoing subdivisions, the clerk may accept the sworn or affirmed statement or affidavit of any person having knowledge of the circumstances of the execution, and may accept proof of the handwriting of the testator and of the subscribing witnesses or any of them.

(4) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(5) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (1) above, may be probated in this state upon receipt by the clerk of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

History: En. 91A-3-303 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners

substitutes for the last sentence in the first paragraph of subsection (3) and subdivisions (a) to (c) thereof the following language: "In other cases, the Registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of

any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will."

Editorial Board Comment

The purpose of this section is to permit informal probate of a will which from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in [Chapter 2], it will, of course, "appear" to be well executed and include the recital necessary for easy pro-

bate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See section [91A-3-402]. Pendency of formal probate proceedings blocks under section [91A-3-401].

91A-3-304. Informal probate unavailable in certain cases. Applications for informal probate which relate to one (1) or more of a known series of testamentary instruments (other than wills and codicils), the latest of which does not expressly revoke the earlier, shall be declined.

History: En. 91A-3-304 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The [clerk] handles the informal pro-

ceeding, but is required to decline applications in certain cases where circumstances suggest that formal probate would provide desirable safeguards.

91A-3-305. Informal probate—clerk not satisfied. If the clerk is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of sections 91A-3-303 and 91A-3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

History: En. 91A-3-305 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The purpose of this section is to recognize that the [clerk] should have some authority to deny probate to an instrument even though all stated statutory re-

quirements may be said to have been met. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be brought before the judge in the normal way for contested matters.

91A-3-306. Informal probate—notice requirements. The moving party must give notice as described by section 91A-1-401 of his application for informal probate (1) to any person demanding it pursuant to section 91A-3-204; and

(2) to any personal representative of the decedent whose appointment has not been terminated.

No other notice of informal probate is required.

History: En. 91A-3-306 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This provision assumes that there will be a single office within each county or other area of jurisdiction of the probate court which can be checked for de-

mands for notice relating to estates in that area. If there are or may be several registrars within a given area, provision would need to be made so that information concerning demands for notice might be obtained from the chief registrar's place of business.

91A-3-307. Informal appointment proceedings—delay in order—duty of clerk—effect of appointment. (1) Upon receipt of an application for

informal appointment of a personal representative other than a special administrator as provided in section 91A-3-614, if at least one hundred twenty (120) hours have elapsed since the decedent's death, the clerk, after making the findings required by section 91A-3-308, shall appoint the applicant subject to qualification and acceptance; provided, that if the decedent was a nonresident, the clerk shall delay the order of appointment until thirty (30) days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

(2) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 91A-3-608 through 91A-3-612, but is not subject to retroactive vacation.

History: En. 91A-3-307 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Section [91A-3-703] describes the duty of a personal representative and the protection available to one who acts un-

der letters issued in informal proceedings. The provision requiring a delay of thirty days from death before appointment of a personal representative for a nonresident decedent is new. It is designed to permit the first appointment to be at the decedent's domicile. See section [91A-3-203].

91A-3-308. Informal appointment proceedings—proof and findings required. (1) In informal appointment proceedings, the clerk must determine whether:

(a) the application for informal appointment of a personal representative is complete;

(b) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(c) the applicant appears from the application to be an interested person as defined in section 91A-1-201(21);

(d) on the basis of the statements in the application, venue is proper;

(e) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(f) any notice required by section 91A-3-204 has been given;

(g) from the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

(2) Unless section 91A-3-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in section 91A-3-610(3) has been appointed in this or another county of this state, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

History: En. 91A-3-308 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Sections [91A-3-614 and 91A-3-615] make it clear that a special administrator may be appointed to conserve the estate during any period of delay in probate of a will. Even though the will has not been approved, section [91A-3-614] gives priority for appointment as special administrator to the person nominated by the will which has been offered for pro-

bate. Section [91A-3-203] governs priorities for appointment. Under it, one or more of the same class may receive priority through agreement of the others.

The last sentence of the section is designed to prevent informal appointment of a personal representative in this state when a personal representative has been previously appointed at the decedent's domicile. Sections [91A-4-204 and 91A-4-205] may make local appointment unnecessary. Appointment in formal proceedings is possible, however.

91A-3-309. Informal appointment proceedings—clerk not satisfied.

If the clerk is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of sections 91A-3-307 and 91A-3-308, or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

History: En. 91A-3-309 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Authority to decline an application for appointment is conferred on the [clerk].

Appointment of a personal representative confers broad powers over the assets of a decedent's estate. The process of declining a requested appointment for unclassified reasons should be one which a [clerk] can use quickly and informally.

91A-3-310. Informal appointment proceedings—notice requirements.

The moving party must give notice as described by section 91A-1-401 of his intention to seek an appointment informally: (1) to any person demanding it pursuant to section 91A-3-204; and

(2) to any person having a prior or equal right to appointment not waived in writing and filed with the court. No other notice of an informal appointment proceeding is required.

History: En. 91A-3-310 by Sec. 1, Ch. 365, L. 1974.

91A-3-311. Informal appointment proceedings—unavailable in certain cases. If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state, and which is not filed for probate in this court, the clerk shall decline the application.

History: En. 91A-3-311 by Sec. 1, Ch. 365, L. 1974.

Part 4—Formal Testacy and Appointment Proceedings

Section

- 91A-3-401. Formal testacy proceedings—nature—when commenced.
- 91A-3-402. Formal testacy or appointment proceedings—petition—contents.
- 91A-3-403. Formal testacy proceeding—notice of hearing on petition.
- 91A-3-404. Formal testacy proceedings—written objections to probate.
- 91A-3-405. Formal testacy proceedings—uncontested cases—hearings and proof.
- 91A-3-406. Formal testacy proceedings—contested cases—testimony of attesting witnesses.
- 91A-3-407. Formal testacy proceedings—burdens in contested cases.

- 91A-3-408. Formal testacy proceedings—will construction—effect of final order in another jurisdiction.
- 91A-3-409. Formal testacy proceedings—order—foreign will.
- 91A-3-410. Formal testacy proceedings—probate of more than one instrument.
- 91A-3-411. Formal testacy proceedings—partial intestacy.
- 91A-3-412. Formal testacy proceedings—effect of order—vacation.
- 91A-3-413. Formal testacy proceedings—vacation of order for other cause.
- 91A-3-414. Formal proceedings regarding appointment of personal representative.

91A-3-401. Formal testacy proceedings—nature—when commenced.

A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 91A-3-402(1) in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition for an order that the decedent died intestate.

A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

During the pendency of a formal testacy proceeding, the clerk shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

History: En. 91A-3-401 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. See section [91A-1-201(44)].

The formal proceedings described by this section may be: (i) an original proceeding to secure "solemn form" probate

of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward

with prima facie proof of due execution. See section [91A-3-407]. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have

any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with section [91A-3-703] directing him to abide by the will. "Distribute" and "distribution" do not include payment of claims. See [sections 91A-1-201(11), 91A-3-807 and 91A-3-902].

91A-3-402. Formal testacy or appointment proceedings—petition—contents. (1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing and contain further statements as indicated in this section. A petition for formal probate of a will

(a) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs,

(b) contains the statements required for informal applications as stated in the five (5) subparagraphs under section 91A-3-301(1), the statements required by subparagraphs (b) and (c) of section 91A-3-301(2), and

(c) states whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(2) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (1) and (4) of section 91A-3-301 and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subparagraph (b) of section 91A-3-301(4) above may be omitted.

History: En. 91A-3-402 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

If a petitioner seeks an adjudication that a decedent died intestate, he is required also to obtain a finding of heirship. A formal proceeding which is to be effective on all interested persons must follow reasonable notice to such persons. It seems desirable to force the proceedings through a formal determination of heirship because the finding will bol-

ster the order, as well as preclude later questions that might arise at the time of distribution.

Unless an order of supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, section [91A-3-414] describes the appropriate procedure.

The words "otherwise unavailable" in [the last paragraph of subsection (1)] are not intended to be read restrictively.

Section [91A-1-309] expresses the verification requirement which applies to all documents filed with the courts.

91A-3-403. Formal testacy proceeding—notice of hearing on petition.

(1) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by section 91A-1-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 91A-3-204 of this code.

Notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(2) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(a) by inserting in one (1) or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) by notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(c) by engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

History: En. 91A-3-403 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Provisions governing the time and manner of notice required by this section and other sections in the code are contained in [91A-1-401].

The provisions concerning search for the alleged decedent are derived from Model Probate Code, Section 71.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice require-

ments extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory requirement relating to such persons might cause undue difficulty. Hence, the statute merely provides that the petitioner may notify other persons.

It would not be inconsistent with this section for the court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.

Section [91A-3-106] provides that an order is valid as to those given notice,

though less than all interested persons were given notice. Section [91A-3-1001 (2)] provides a means of extending a

testacy order to previously unnotified persons in connection with a formal closing.

91A-3-404. Formal testacy proceedings—written objections to probate.

Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

History: En. 91A-3-404 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provi-

sion prevents potential confusion as to who must file what pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

91A-3-405. Formal testacy proceedings—uncontested cases—hearings and proof.

If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 91A-3-409 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one (1) of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

History: En. 91A-3-405 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the court on the formal allowance of the will. The court is not required to conduct a hearing, however.

If no hearing is required, uncontested formal probates can be completed on the strength of the pleadings. There is no good reason for summoning attestors when no interested person wants to force the production of evidence on a formal probate. Moreover, there seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the court may enter judgment on the pleadings.

91A-3-406. Formal testacy proceedings—contested cases—testimony of attesting witnesses.

(1) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one (1) of the attesting witnesses, if within the state competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(2) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

History: En. 91A-3-406 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Model Probate Code section 76, combined with section 77, substantially unchanged. The self-proved will is described

in [Chapter 2]. See section [91A-2-504]. The "conclusive presumption" described here would foreclose questions such as whether the witnesses signed in the presence of the testator. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any

relevant proof that the testator was unaware of the contents of the document. The balance of the section is derived

from Model Probate Code sections 76 and 77.

91A-3-407. Formal testacy proceedings—burdens in contested cases.

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

History: En. 91A-3-407 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is designed to clarify the

law by stating what is believed to be a fairly standard approach to questions concerning burdens of going forward with evidence in will contest cases.

91A-3-408. Formal testacy proceedings—will construction—effect of final order in another jurisdiction. A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

History: En. 91A-3-408 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court. An "authenticated copy" includes copies properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, section [91A-3-202] applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceedings at domicile are concluded, local law will control.

Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local court under either section [91A-3-202] or this section.

Nothing in this section bears on questions of what assets are included in a decedent's estate.

This section adds nothing to existing law as applied to cases where the parties before the local court were also personally before the foreign court, or where the property involved was subject to the power of the foreign court. It extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land. But, choice of law rules frequently produce a similar result. See § 240 Restatement of the Law, Second: Conflict of Laws, p. 73, Proposed Official Draft III, 1969.

This section may be easier to justify than familiar choice of law rules, for its application is limited to instances where the protesting party has had notice of, and an opportunity to participate in, previous litigation resolving the question he now seeks to raise.

91A-3-409. Formal testacy proceedings — order — foreign will. After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by section 91A-3-108, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 91A-3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

History: En. 91A-3-409 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Model Probate Code section 80(a), slightly changed. If the court is not satis-

fied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See [Chapter 5] of this code.

91A-3-410. Formal testacy proceedings—probate of more than one instrument. If two (2) or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one (1) instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one (1) instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 91A-3-412.

History: En. 91A-3-410 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Except as otherwise provided in section [91A-3-412], an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship. Determination of heirs is not barred by the three-year limitation but a judicial de-

termination of heirs is conclusive unless the order may be vacated.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time. See section [91A-3-108].

91A-3-411. Formal testacy proceedings — partial intestacy. If it becomes evident in the course of a formal testacy proceeding that, though one (1) or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

History: En. 91A-3-411 by Sec. 1, Ch. 365, L. 1974.

91A-3-412. Formal testacy proceedings—effect of order—vacation. Subject to appeal and subject to vacation as provided herein and in section 91A-3-413, a formal testacy order under sections 91A-3-409 through 91A-3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) the court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one (1) or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under either (1) or (2) above must be filed prior to the earlier of the following time limits:

(a) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six (6) months after the filing of the closing statement.

(b) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by section 91A-3-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(c) Twelve (12) months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under section 91A-3-403(2) was made.

If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

History: En. 91A-3-412 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The provisions barring proof of late-discovered wills is derived in part from section 81 of Model Probate Code. The same section is the source of the provisions of (5) above. The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. See section [91A-3-401]. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved,

some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds." If neither can be identified through the normal process of tracing assets, their liability depends upon the circumstances. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See sections [91A-3-909 and [91A-3-1005].

91A-3-413. Formal testacy proceedings—vacation of order for other cause. For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

History: En. 91A-3-413 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See sections [91A-1-304 and 91A-1-308].

91A-3-414. Formal proceedings regarding appointment of personal representative. (1) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 91A-3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by section 91A-3-301(1) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(2) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 91A-3-203, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 91A-3-611.

History: En. 91A-3-414 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

A petition raising a controversy concerning the priority or qualifications of a personal representative may be combined with a petition in a formal testacy pro-

ceeding. However, it is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate or no

appointment may be desired. See sections [91A-3-107, 91A-3-301(3), (4) and 91A-3-307]. Furthermore, procedures for securing the appointment of a new personal representative after a previous assumption as to testacy has been changed are provided by section [91A-3-612]. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from "supervised administration." The former includes any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding" and may be re-

quested in addition to a ruling concerning testacy or priority or qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised."

Another point should be noted. The court may not immediately issue letters even though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, sections [91A-3-601] et seq. control the subject of qualification. Section [91A-1-305] deals with letters.

Part 5—Supervised Administration

Section

- 91A-3-501. Supervised administration—nature of proceeding.
- 91A-3-502. Supervised administration—petition—order.
- 91A-3-503. Supervised administration—effect on other proceedings.
- 91A-3-504. Supervised administration—powers of personal administration.
- 91A-3-505. Supervised administration—interim orders—distribution and closing orders.

91A-3-501. Supervised administration—nature of proceeding. Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in sections 91A-3-501 through 91A-3-505, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

History: En. 91A-3-501 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This and the following sections of this part describe an optional procedure for settling an estate in one continuous proceeding in the court. The proceeding is characterized as "in rem" to align it with the concepts described by the Model Probate Code. See Section 62, M.P.C. In cases where supervised administration is not requested or ordered, no compulsion other than self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be

used. Similarly, unless administration is supervised, there is no compulsion other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a formal testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. See section [91A-3-107]. Supervised administration, therefore, is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated. See the Comment following the next section.

91A-3-502. Supervised administration—petition—order. A petition for supervised administration may be filed by any interested person or by

a personal representative at any time or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the court shall order supervised administration of a decedent's estate:

(1) if the decedent's will directs supervised administration, it shall be ordered unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;

(2) if the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or

(3) in other cases if the court finds that supervised administration is necessary under the circumstances.

History: En. 91A-3-502 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The expressed wishes of a testator regarding supervised administration should bear upon, but not control, the question of whether supervised administration will be ordered. This section is designed to achieve a fair balance between the wishes of the decedent, and the interests of successors in regard to supervised administration.

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy before the court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settlement of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in sections [91A-3-1101 and 91A-3-1102] are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of duty by a personal representative who is not supervised are available under Part 6 of this [chapter]. Finally, each personal representative consents to jurisdiction of the court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the court following mailed notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

91A-3-503. Supervised administration—effect on other proceedings.

(1) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(2) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by section 91A-3-401.

(3) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

History: En. 91A-3-503 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The duties and powers of a personal representative are described in Part 7 of this [chapter]. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See section [91A-3-713]. However, formal proceedings against a personal representative may involve requests for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of court if he disregarded the restriction. See section [91A-3-607]. If a proceeding also involved a demand

that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual under the jurisdiction's system for the *lis pendens* concept.

The word "restricts" in the last sentence is intended to negate the idea that a judicial order specially qualifying the powers and duties of a personal representative is a restraining order in the usual sense. The section means simply that some supervised personal representatives may receive the same powers and duties as ordinary personal representatives, except that they must obtain a court order before paying claimants or distributing, while others may receive a more restricted set of powers. Section [91A-3-607] governs petitions which seek to limit the power of a personal representative.

91A-3-504. Supervised administration—powers of personal administration. Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

History: En. 91A-3-504 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and

are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See section [91A-3-713].

91A-3-505. Supervised administration—interim orders—distribution and closing orders. Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under section 91A-3-1001. Interim orders approving or directing partial distributions or

granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

History: En. 91A-3-505 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Since supervised administration is a single proceeding, the notice requirement contained in [section 91A-3-106] relates to the notice of institution of the proceedings which is described with particularity by section [91A-3-502]. The above section makes it clear that an additional notice is required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be

covered by court order or rule. There was a suggestion for a rule as follows: "Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding." [Section 91A-1-402] permits any person to waive notice by a writing filed in the proceeding.

A demand for notice under section [91A-3-204] would entitle any interested person to notice of any interim order which might be made in the course of supervised administration.

Part 6—Personal Representative—Appointment, Control and Termination of Authority

Section

- 91A-3-601. Qualification of personal representative.
- 91A-3-602. Acceptance of appointment—consent to jurisdiction.
- 91A-3-603. Bond not required without court order—exceptions.
- 91A-3-604. Bond amount—security—procedure—reduction.
- 91A-3-605. Demand for bond by interested person.
- 91A-3-606. Terms and conditions of bond.
- 91A-3-607. Order restraining personal representative.
- 91A-3-608. Termination of appointment—general.
- 91A-3-609. Termination of appointment—death or disability.
- 91A-3-610. Termination of appointment—voluntary.
- 91A-3-611. Termination of appointment by removal—cause—procedure.
- 91A-3-612. Termination of appointment—change of testacy status.
- 91A-3-613. Successor personal representative.
- 91A-3-614. Special administrator—appointment.
- 91A-3-615. Special administrator—who may be appointed.
- 91A-3-616. Special administrator—appointed informally—powers and duties.
- 91A-3-617. Special administrator—formal proceedings—power and duties.
- 91A-3-618. Termination of appointment—special administrator.

91A-3-601. Qualification of personal representative. Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

History: En. 91A-3-601 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This and related sections of this part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal

or informal, or whether the personal representative is supervised. Section [91A-1-305] authorizes issuance of copies of letters and prescribes their content. The section should be read with section [91A-3-504] which directs endorsement on letters of any restrictions of power of a supervised administrator.

91A-3-602. Acceptance of appointment—consent to jurisdiction. By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to him by

ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

History: En. 91A-3-602 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Except for personal representatives appointed pursuant to section [91A-3-502], appointees are not deemed to be "officers" of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See section [91A-3-107]. Yet, it is desirable to continue present patterns which prevent a personal representative who might make himself unavailable to service within the state from affecting the power of the ap-

pointing court to enter valid orders affecting him. See *Michigan Trust Co. v. Ferry* (1912) 228 U.S. 346, 57 L.Ed. 867, 33 S.Ct. 550. The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

91A-3-603. Bond not required without court order—exceptions. No bond is required of a personal representative appointed in informal proceedings, except (1) upon the appointment of a special administrator;

(2) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or

(3) when bond is required under section 91A-3-605.

Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

History: En. 91A-3-603 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to applications in informal proceedings, from passing judgment in each case on the need for bond. The point is that the court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (section [91A-3-204]), to contest a requested appointment by use of a formal

testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section [91A-3-105] gives general authority to the court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in sections [91A-3-605 and 91A-3-607]. Finally, interested persons have assurance under this code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond. Surely, it permits a

reduction in the procedures which must occur in uncomplicated estates where interested persons are perfectly willing to trust each other and the fiduciary.

91A-3-604. Bond amount—security—procedure—reduction. If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the clerk indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the clerk, or give other suitable security, in an amount not less than the estimate. The clerk shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property or other adequate security. The clerk may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in section 91A-6-101) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

History: En. 91A-3-604 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that esti-

mates of value of estates no longer need appear in the petitions and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved. A co-signature arrangement might constitute adequate security within the meaning of this section.

91A-3-605. Demand for bond by interested person. Any person apparently having an interest in the estate worth in excess of one thousand dollars (\$1,000), or any creditor having a claim in excess of one thousand dollars (\$1,000), may make a written demand that a personal representative give bond. The demand must be filed with the clerk and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in section 91A-3-603 or 91A-3-604. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty (30) days after receipt of notice is cause for his removal and appointment of a successor personal representative.

History: En. 91A-3-605 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appoint-

ed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided

by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by section

[91A-3-705] to give each beneficiary includes a statement concerning whether bond has been required.

91A-3-606. Terms and conditions of bond. (1) The following requirements and provisions apply to any bond required by this part:

(a) Bonds shall name the state as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(b) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(c) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(d) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(e) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(2) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

History: En. 91A-3-606 by Sec. 1, Ch. 365, L. 1974.

on Section 109 of the Model Probate Code. [Subdivision (1)(c)] is derived from Section 118 of the Model Probate Code.

Editorial Board Comment

[Subdivision (1)(a)] is based, in part,

91A-3-607. Order restraining personal representative. (1) On petition of any person who appears to have an interest in the estate, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(2) The matter shall be set for hearing within ten (10) days unless the parties otherwise agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the petition.

History: En. 91A-3-607 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Cf. section [91A-3-401] which provides for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the

safeguards relating to the process for appointment of a personal representative, permit "control" of a personal representative that is believed to be equal, if not superior to that presently available with respect to "supervised" personal representatives appointed by inferior courts. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in section [91A-3-602], is practically in the position of one who, on motion, may be cited to appear before a judge.

91A-3-608. Termination of appointment—general. Termination of appointment of a personal representative occurs as indicated in sections 91A-3-609 to 91A-3-612, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

History: En. 91A-3-608 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

"Termination," as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been com-

menced against the personal representative prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge." However, an order of the court entered under [section 91A-3-1001 or 91A-3-1002] both terminates the appointment of, and discharges, a personal representative.

91A-3-609. Termination of appointment—death or disability. The death of a personal representative or the appointment of a conservator for the estate of a personal representative, terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.

History: En. 91A-3-609 by Sec. 1, Ch. 365, L. 1974.

91A-3-610. Termination of appointment—voluntary. (1) An appointment of a personal representative terminates as provided in section 91A-3-1003, one (1) year after the filing of a closing statement.

(2) An order closing an estate as provided in section 91A-3-1001 or 91A-3-1002 terminates an appointment of a personal representative.

(3) A personal representative may resign his position by filing a written statement of resignation with the clerk after he has given at least fifteen (15) days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him.

History: En. 91A-3-610 by Sec. 1, Ch. 365, L. 1974.

cedure for resignation by a personal representative which may occur without judicial assistance.

Editorial Board Comment

[Subsection (3)] above provides a pro-

91A-3-611. Termination of appointment by removal—cause—procedure.

(1) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 91A-3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(2) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

History: En. 91A-3-611 by Sec. 1, Ch. 365, L. 1974.

set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the court.

Editorial Board Comment

Thought was given to qualifying [(1)] above so that no formal removal proceedings could be commenced until after a

91A-3-612. Termination of appointment—change of testacy status. Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or

under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in section 91A-3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty (30) days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

History: En. 91A-3-612 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section and section [91A-3-401] describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i. e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of

the person who would be entitled to serve if his assumption concerning the decedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for section [91A-3-703] is broad enough to require him to administer the estate as intestate, or under a later probated will, if either status is established after he was appointed. Under section [91A-3-403], notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

91A-3-613. Successor personal representative. Sections 91A-3-301 through 91A-3-414 govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

History: En. 91A-3-613 by Sec. 1, Ch. 365, L. 1974.

91A-3-614. Special administrator — appointment. A special administrator may be appointed:

(1) informally by the clerk on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in section 91A-3-609;

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

History: En. 91A-3-614 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the court. Appointment of a special administrator would enable the estate to participate in a transaction which the

general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by section [91A-3-716].

91A-3-615. Special administrator—who may be appointed. (1) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available, and qualified.

(2) In other cases, any proper person may be appointed special administrator.

History: En. 91A-3-615 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The provisions of this code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will. Nonetheless,

there will be instances where contests begin before probate and where it may be necessary to appoint a special administrator. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

91A-3-616. Special administrator—appointed informally—powers and duties. A special administrator appointed by the clerk in informal proceedings pursuant to section 91A-3-614(1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the code necessary to perform his duties.

History: En. 91A-3-616 by Sec. 1, Ch. 365, L. 1974.

91A-3-617. Special administrator—formal proceedings—power and duties. A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order.

The appointment may be for a specified time, to perform particular acts or on other terms as the court may direct.

History: En. 91A-3-617 by Sec. 1, Ch. 365, L. 1974.

91A-3-618. Termination of appointment—special administrator. The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in sections 91A-3-608 through 91A-3-611.

History: En. 91A-3-618 by Sec. 1, Ch. 365, L. 1974.

Part 7—Duties and Powers of Personal Representatives

Section

- 91A-3-701. Time of accrual of duties and powers.
- 91A-3-702. Priority among different letters.
- 91A-3-703. General duties—relation and liability to persons interested in estate—standing to sue.
- 91A-3-704. Personal representative to proceed without court order—exception.
- 91A-3-705. Duty of personal representative—information to heirs and devisees.
- 91A-3-706. Duty of personal representative—supplementary inventory and appraisal—employment of appraiser—copy to department of revenue.
- 91A-3-707. Duty of personal representative—supplementary inventory—copy to department of revenue.
- 91A-3-708. Duty of personal representative—possession of estate.
- 91A-3-709. Power to avoid transfers.
- 91A-3-710. Improper exercise of power—breach of fiduciary duty.
- 91A-3-711. Sale, encumbrance or transaction involving conflict of interest—voidable—exceptions.
- 91A-3-712. Persons dealing with personal representatives—protection.
- 91A-3-713. Transactions authorized for personal representatives—exceptions.
- 91A-3-714. Final accounting—disposition of copies—further accountings—vouchers—challenges.
- 91A-3-715. Sale of estate property after delivery of inventory to department of revenue and payment or waiver of taxes—exception.
- 91A-3-716. Powers and duties of successor personal representative.
- 91A-3-717. Corepresentatives—when joint action required.
- 91A-3-718. Powers of surviving personal representative.
- 91A-3-719. Compensation of personal representative.
- 91A-3-720. Compensation of attorney.
- 91A-3-721. Expenses in estate litigation.
- 91A-3-722. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate—court to set disputed fee.

91A-3-701. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to his body, funeral and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

History: En. 91A-3-701 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section codifies the doctrine that the authority of a personal representative.

relates back to death from the moment it arises. It also makes it clear that authority of a personal representative stems from his appointment. The sentence concerning ratification is designed to eliminate technical questions that

might arise concerning the validity of acts done by others prior to appointment. Section [91A-3-713(21)] relates to delegation of authority after appointment. The third sentence accepts an idea found in the Illinois Probate Act, § 79.

91A-3-702. Priority among different letters. A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

History: En. 91A-3-702 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a corepresentative or of a special administrator. The sentence concerning erroneous dual appointment is derived from recent New York legislation. See Section 704, Surrogate's Court Procedure Act.

Erroneous appointment of a second personal representative is possible if formal proceedings after notice are employed. It might be desirable for a state to promulgate a system whereby a notation of letters issued by each county probate office would be relayed to a central record keeping office which, in turn could indicate to any other office whether letters for a particular decedent, perhaps identified by social security number, had been issued previously. The problem can arise even though notice to known interested persons and by publication is involved.

91A-3-703. General duties—relation and liability to persons interested in estate—standing to sue. (1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees under the laws of the state of Montana. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration and of this code, an informally probated will is authority to administer and distribute the estate according to its terms. Subject to the provisions of this code, an order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this code.

(3) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

History: En. 91A-3-703 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See section [91A-3-501].

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the court. But, the code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See sections [91A-3-107 and 91A-3-704]. Subsection [(2)] is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time." Thus, a personal representative may rely upon

and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See section [91A-3-302] concerning the status of a will probated without notice and section [91A-3-102] concerning the ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. See sections [91A-3-909 and 91A-3-1004]. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

[Subsection (3)] is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of [chapter 4] are designed to eliminate many of the present reasons for ancillary administrations.

91A-3-704. Personal representative to proceed without court order—exception. A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified under this code or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

History: En. 91A-3-704 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section [91A-3-105]

grants broad subject matter jurisdiction to the probate court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

91A-3-705. Duty of personal representative—information to heirs and devisees. Not later than thirty (30) days after his appointment every personal representative, except any special administrator, shall give in-

formation of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

History: En. 91A-3-705 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three-

year statute of limitations provided in section [91A-3-108], or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under section [91A-3-401] or, in connection with a formal closing, as provided by section [91A-3-1001].

No information or notice is required by this section if no personal representative is appointed.

91A-3-706. Duty of personal representative—supplementary inventory and appraisement—employment of appraiser—copy to department of revenue. Within three (3) months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory, which inventory shall include listing of all property which the decedent owned, had an interest in or control over, individually, in common, or jointly, or otherwise had at the time of his death; or had possessory or dispositive rights over at the time of his death or had disposed of for less than its fair market value within three (3) years of his death; or which was affected by his death for the purpose of inheritance or estate taxes. The inventory shall include a statement of the full and true value of the decedent's interest in every item listed in such inventory. In this connection the personal representative

shall appoint at least three (3) qualified and disinterested persons, any two (2) of whom may act, to assist him in ascertaining the fair market value as of the date of the decedent's death of all assets included in the estate. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

The personal representative shall send a copy of the inventory to interested persons who request it, and he shall file the original of the inventory with the court. In any event, a copy of the inventory and statement of value shall be mailed to the department of revenue.

History: En. 91A-3-706 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The first paragraph of the corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners reads as follows: "Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item." The second sentence in the second paragraph is omitted in the official text. Section 3-707 of the Uniform Probate Code, relating to employment to appraisers, is omitted from the Montana enactment.

Editorial Board Comment

This and the following sections eliminate the practice now required by many

probate statutes under which the judge is involved in the selection of appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section [91A-3-611]. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons who request it, information concerning the assets of the estate need not become a part of the records of the probate court. The alternative procedure is to file the inventory with the court. This procedure would be indicated in estates with large numbers of interested persons, where the burden of sending copies to all would be substantial. The court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. See [91A-3-204], which permits any interested person to demand notice of any document relating to an estate which may be filed with the court.

91A-3-707. Duty of personal representative—supplementary inventory—copy to department of revenue. If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information; and in any case shall mail a copy of it to the department of revenue.

History: En. 91A-3-707 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the

National Conference of Commissioners is designated as section 3-708; the requirement for mailing a copy of the supplementary inventory to the department of revenue was added in the Montana enactment.

91A-3-708. Duty of personal representative—possession of estate. Except as otherwise provided by a decedent's will and subject to the provisions of section 91-3205, R. C. M. 1947, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

History: En. 91A-3-708 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-709; the Montana enactment inserted "and subject to the provisions of section 91-3205, R. C. M. 1947" in the first sentence of the section.

Editorial Board Comment

Section [91A-3-101] provides for the devolution of title on death. Section [91A-3-710] defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

This code follows the Model Probate Code in regard to partnership interests. In the introduction to the Model Probate Code, the following appears at p. 22:

"No provisions for the administration of partnership estates when a partner dies have been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan. Gen. Stat. (Supp. 1943) §§ 59-1001 to 59-1005; Mo. Rev. Stat. Ann. (1942) §§ 81 to 93. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. Woener, Administration (3rd ed., 1923) §§ 128 to 130; annotation, 121 A.L.R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act [secs. 63-101 et seq.] providing for winding up by the surviving partner. Davis v. Hutchinson (C.C.A. 9th, 1929) 36 F.(2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it."

91A-3-709. Power to avoid transfers. The property liable for the payment of unsecured debts of a decedent includes all property transferred

by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

History: En. 91A-3-709 by Sec. 1, Ch. 365, L. 1974.

tives in general, is omitted from the Montana enactment.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-710. Section 3-711 of the Uniform Probate Code, relating to powers of personal representa-

Editorial Board Comment

Model Probate Code section 125, with additions. See, also, section [91A-6-101] which saves creditors' rights in regard to nontestamentary transfers effective at death.

91A-3-710. Improper exercise of power—breach of fiduciary duty. If any exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 91A-3-711 and 91A-3-712.

History: En. 91A-3-710 by Sec. 1, Ch. 365, L. 1974.

3-611] he may petition the court for an order removing the personal representative.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-712.

Editorial Board Comment

An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty. (1) Under section [91A-3-607] he may apply to the court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration. (2) Under section [91A-

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition, sections [91A-1-302 and 91A-3-105] authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under section [91A-3-607].

91A-3-711. Sale, encumbrance or transaction involving conflict of interest—voidable—exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless

(1) the will or a contract entered into by the decedent expressly authorized the transaction; or

(2) the transaction is approved by the court after notice to interested persons.

History: En. 91A-3-711 by Sec. 1, Ch. 365, L. 1974.

form Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-713.

Compiler's Notes

The corresponding section in the Uni-

Editorial Board Comment

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles

except as to purchasers with actual knowledge of the breach. See section [91A-3-712]. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

91A-3-712. Persons dealing with personal representatives—protection.

A person who in good faith and without notice either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 91A-3-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries nor does it in any way limit the provisions of section 91A-3-1010.

History: En. 91A-3-712 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-714; the Montana enactment added the phrase "nor does it in any way limit the provisions of section 91A-3-1010" at the end of the section.

Editorial Board Comment

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. See section [91A-3-703]. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures described in sections [91A-3-501 to 91A-3-505]. Each state will need to identify the relation between this section and other statutory provisions creating liens on estate assets for inheritance and other taxes. The section cannot control whether a purchaser takes free of the lien of unpaid

federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. See section 6234, Internal Revenue Code.

The impact of formal recording systems beyond the usual probate procedure depends upon the particular statute. In states in which the recording system provides for recording wills as muniments of title, statutory adaptation should be made to provide that recording of wills should be postponed until the validity has been established by probate or limitation. Statutory limitation to this effect should be added to statutes which do not so provide to avoid conflict with power of the personal representative during administration. The purpose of the code is to make the deed or instrument of distribution the usual muniment of title. See sections [91A-3-907, 91A-3-908, 91A-3-910]. However, this is not available when no administration has occurred and in that event reliance upon general recording statutes must be had.

If a state continues to permit wills to be recorded as muniments of title, the above section would need to be qualified to give effect to the notice from recording.

91A-3-713. Transactions authorized for personal representatives—exceptions. Except as restricted by this code or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 91A-3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries, or other sources;

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) execute and deliver a deed of conveyance for cash payment of all sums remaining due on the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

- (11) with the consent of the heirs or devisees or the court, abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;
- (12) vote stocks or other securities in person or by general or limited proxy;
- (13) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;
- (14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;
- (15) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;
- (16) borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;
- (17) with the consent of the heirs or devisees or the court effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;
- (18) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;
- (19) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (20) allocate items of income or expense to either estate income or principal, as permitted or provided by law;
- (21) employ persons, including attorneys, auditors, investment advisers, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one (1) or more agents to perform any act of administration, whether or not discretionary;
- (22) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;
- (23) sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances provided, however, no personal representative shall without prior court approval in a supervised proceeding, either directly or indirectly purchase any property

of the estate he represents, nor shall he be interested in any such sale. All sales shall be fairly conducted and made for the best price obtainable.

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) in the same business form for a period of not more than four (4) months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will;

(b) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or

(c) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) satisfy and settle claims and distribute the estate as provided in this code.

History: En. 91A-3-713 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-715. The Montana enactment inserted the phrase "with the consent of the heirs or devisees or the court" at the beginning of subdivisions (11) and (17) and a subdivision in the Uniform Probate Code section authorizing provision "for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate" was omitted.

Editorial Board Comment

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Subparagraphs [(26)] and (18) support the other provisions of the code, particularly section [91A-3-704], which contemplates that personal representatives will proceed with

all of the business of administration without court orders.

In part, subparagraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of subparagraph (4) is to permit the personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to a surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

Subsection (3) is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights. The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to his death.

91A-3-714. Final accounting—disposition of copies—further accountings—vouchers—challenges. Before any estate may be finally closed and

the personal representative relieved from his duties and obligations thereunder he shall either file with the court or deliver to all interested persons an accounting under oath showing the amount of money received and expended by him, the amount of all claims presented against the estate and the names of the claimants and all other matters necessary to show the state of its affairs. A copy of such account shall also be mailed to the department of revenue. Any interested person at any time during the course of administration of an estate may for good cause shown require further accountings. In rendering any account the personal representative must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which shall be filed with the clerk of court, provided that no voucher shall be required if the item of expenditure does not exceed fifty dollars (\$50). Upon the mailing or filing of any such account, any interested person may challenge the same in writing, and if the proceeding is at the time of such challenge informal, the challenge of such account shall be deemed a supervised matter.

History: En. 91A-3-714 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-3-715. Sale of estate property after delivery of inventory to department of revenue and payment or waiver of taxes—exception. Save upon an order of court obtained after notice and hearing in a supervised proceeding or formal probate, no property of the estate shall be sold unless and until a proper inventory and statement of value has been delivered to the state department of revenue and the tax due the state of Montana has been paid or the department of revenue has waived that tax in connection with the sale of the property.

History: En. 91A-3-715 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-3-716. Powers and duties of successor personal representative. A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

History: En. 91A-3-716 by Sec. 1, Ch. 365, L. 1974.

91A-3-717. Corepresentatives—when joint action required. If two (2) or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a corepresentative has been delegated to act for the others. Persons dealing with a corepresentative if actually unaware that another

has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

History: En. 91A-3-717 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

With certain qualifications, this section is designed to compel corepresentatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that

may result from the delegation. A corepresentative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by section [91A-3-703]. Section [91A-3-713(21)] authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

91A-3-718. Powers of surviving personal representative. Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one (1) or more remaining after the appointment of one (1) or more is terminated, and if one (1) of two (2) or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office.

History: En. 91A-3-718 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Source, Model Probate Code section 102. This section applies where one of two or more corepresentatives dies, becomes disabled or is removed. In regard to coexecutors, it is based on the assumption

that the decedent would not consider the powers of his fiduciaries to be personal, or to be suspended if one or more could not function. In regard to coadministrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

91A-3-719. Compensation of personal representative. (1) A personal representative is entitled to reasonable compensation for his services. Such compensation shall not exceed three per cent (3%) of the first forty thousand dollars (\$40,000) of the value of the estate as reported for federal estate tax or state inheritance tax purposes, whichever is larger and two per cent (2%) of the value of the estate in excess of forty thousand dollars (\$40,000) as reported for federal estate tax or state inheritance tax purposes, whichever is larger.

(2) In proceedings conducted for the termination of joint tenancies, the compensation of the personal representative shall not exceed two per cent (2%) of the interest passing.

(3) In proceedings conducted for the termination of a life estate, the compensation allowed the personal representative shall not exceed two per cent (2%) of the value of the life estate if it is terminated in connection with a probate or joint tenancy termination. If a life estate is terminated separately, the personal representative's compensation shall not exceed two per cent (2%) of the value of the estate, except that it shall not be less than one hundred dollars (\$100).

(4) If there is more than one personal representative, only one compensation is allowed.

(5) The court may allow additional compensation for extraordinary services. Such additional compensation shall not be greater than the amount which is allowed for the original compensation.

(6) If the will provides for the compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to compensation under the terms of this section. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

History: En. 91A-3-719 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners reads as follows: "A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensa-

tion. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court."

Editorial Board Comment

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

91A-3-720. Compensation of attorney. (1) If the services of an attorney are engaged by the personal representative, the compensation of such attorney shall not exceed one and one half ($1\frac{1}{2}$) times the compensation allowable to the personal representative.

(2) If the services of an attorney are engaged by the personal representative to assist in the termination of joint tenancies, the compensation allowed the attorney shall not exceed three per cent (3%) of the interest passing.

(3) If the services of an attorney are engaged in connection with the termination of a life estate, the compensation allowed the attorney shall not exceed three per cent (3%) of the value of the life estate if it is terminated in connection with a probate or joint tenancy termination. If a life estate is terminated separately, the attorney's compensation shall not exceed three per cent (3%) except that it shall not be less than one hundred dollars (\$100).

(4) If the services of more than one attorney are engaged, only one compensation shall be allowed.

(5) In cases where further compensation may be allowed to an attorney, the same must be fixed and determined by the court upon good cause shown after notice and hearing of an application therefor.

History: En. 91A-3-720 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-3-721. Expenses in estate litigation. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

History: En. 91A-3-721 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-720.

Editorial Board Comment

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (section [91A-3-703]). Though the will naming him may not yet be probated, the priority for appointment conferred by section [91A-3-203] on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the pro-

bate of the will. Hence, he is an interested person within the meaning of sections [91A-3-301 and 91A-3-401]. Section [91A-3-912] gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

91A-3-722. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate—court to set disputed fee. Upon the filing of a motion for settlement of fees by the court filed by an interested person, the personal representative or the person employed by the personal representative and after notice to all interested persons, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, shall be reviewed and determined by the court. In any dispute concerning fees, the court shall set the fee. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

History: En. 91A-3-722 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-721 and reads as follows: "After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment adviser or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who

has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds."

Editorial Board Comment

In view of the broad jurisdiction conferred on the probate court by section [91A-3-105], description of the special proceeding authorized by this section might be unnecessary. But, the code's theory that personal representatives may fix their own fees and those of estate attorneys marks an important departure from much existing practice under which fees are determined by the court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

Part 8—Creditors' Claims

Section	
91A-3-801.	Notice to creditors.
91A-3-802.	Statutes of limitations.
91A-3-803.	Limitations of presentation of claims—exception.
91A-3-804.	Manner of presentation of claims.
91A-3-805.	Classification of claims.
91A-3-806.	Allowance of claims.
91A-3-807.	Payment of claims.
91A-3-808.	Individual liability of personal representative.
91A-3-809.	Secured claims.
91A-3-810.	Claims not due and contingent on unliquidated claims.
91A-3-811.	Counterclaims.
91A-3-812.	Execution and levies prohibited.
91A-3-813.	Compromise of claims.
91A-3-814.	Encumbered assets.
91A-3-815.	Administration in more than one state—duty of personal representative.
91A-3-816.	Final distribution to domiciliary personal representative.

EDITORIAL BOARD COMMENT

The need for uniformity of law regarding creditors' claims against estates is especially strong. Commercial and consumer credit depends upon efficient collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in fifty codes of probate.

The sections which follow facilitate collection of claims against decedents in several ways. First, a simple written statement mailed to the personal representative is a sufficient "claim." Allowance of claims is handled by the personal representative and is assumed if a claimant is not advised of disallowance. Also, a personal representative may pay any just claims without presentation and at any time, if he is willing to assume risks which will be minimal in many cases. The period of uncertainty regarding possible claims is only four months from first publication. This should expedite settlement and distribution of estates.

91A-3-801. Notice to creditors. Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for three (3) successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within four (4) months after the date of the first publication of the notice or be forever barred, and proof of publication shall be filed with the clerk.

History: En. 91A-3-801 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment added the phrase "and proof of publication shall be filed with the clerk" at the end of this section.

Editorial Board Comment

Section [91A-3-1203], relating to small estates, contains an important qualification on the duty created by this section.

Failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under section [91A-3-1005], the personal representative

may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection afforded personal representatives under section [91A-3-1003] would not be available, for that section applies only if the personal representative truthfully recites that he has advertised for claims as required by this section.

It would be appropriate, by court rule, to channel publications through the personnel of the probate court. See section [91A-1-401]. If notices are controlled by a centralized authority, some assurance could be gained against publication in newspapers of small circulation. Also, the form of notices could be made uniform and certain efficiencies could be achieved. For example, it would be compatible with

this section for the court to publish a single notice each day or each week listing the names of personal representatives ap-

pointed since the last publication, with addresses and dates of nonclaim.

91A-3-802. Statutes of limitations. Unless an estate is insolvent the personal representative, with the consent of all successors, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the four (4) months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow. For purposes of any statute of limitations, the proper presentation of a claim under section 91A-3-804 is equivalent to commencement of a proceeding on the claim.

History: En. 91A-3-802 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section means that four months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the nonclaim provisions of section [91A-3-803] have not been triggered. Hence, the nonclaim and limitation provisions of section [91A-3-803] are not exclusive.

It should be noted that under sections [91A-3-803 and 91A-3-804] it is possible for a claim to be barred by the process of claim, disallowance and failure by the creditor to commence a proceeding to enforce his claim prior to the end of the four-month suspension period. Thus, the regular statute of limitations applicable during the debtor's lifetime, the nonclaim provisions of sections [91A-3-803, 91A-3-804], and the three-year limitation of section [91A-3-803] all have potential application to a claim. The first of the three to accomplish a bar controls.

91A-3-803. Limitations of presentation of claims—exception. (1) All claims against a decedent's estate with the exception of claims founded on tort which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) within four (4) months after the date of the first publication of notice to creditors if notice is given in compliance with section 91A-3-801; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state; or

(b) within three (3) years after the decedent's death, if notice to creditors has not been published.

(2) All claims against a decedent's estate with the exception of claims founded on tort which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative, within four (4) months after performance by the personal representative is due;

(b) any other claim, within four (4) months after it arises.

(3) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

History: En. 91A-3-803 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

There was some disagreement among the Reporters over whether a short period of limitations, or of nonclaim, should be provided for claims arising at or after death. [Subsection (2)] was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under section [91A-3-808] a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation

that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of [subsection (3)]. If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The limitation stated in [subdivision (1)(b)] dovetails with the three-year limitation provided in section [91A-3-108] to eliminate most questions of succession that are controlled by state law after three years from death have elapsed. Questions of interpretation of any will probated within such period, or of the identity of heirs in intestacy are not barred, however.

91A-3-804. Manner of presentation of claims. Claims against a decedent's estate may be presented as follows:

(1) The claimant shall mail to the personal representative return receipt requested a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.

(3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty (60) days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty (60) day period, or to avoid injustice the court, on petition, may order an extension of the sixty (60) day period, but in no event shall the extension run beyond the applicable statute of limitations.

History: En. 91A-3-804 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The filing of a claim with the probate court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his

claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under section [91A-3-706].

In reading this section it is important to remember that a regular statute of limitation may run to bar a claim before the nonclaim provisions run. See section [91A-3-802].

91A-3-805. Classification of claims. (1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (a) costs and expenses of administration;
- (b) reasonable funeral expenses;
- (c) debts and taxes with preference under federal law;
- (d) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
- (e) debts and taxes with preference under the laws of this state;
- (f) all other claims.

(2) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

History: En. 91A-3-805 by Sec. 1, Ch. 365, L. 1974.

91A-3-806. Allowance of claims. (1) As to claims presented in the manner described in section 91A-3-804 within the time limit prescribed in 91A-3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty (60) days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for sixty (60) days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

(2) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (1) of this section. Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(3) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(4) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty (60) days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

History: En. 91A-3-806 by Sec. 1, Ch. 365, L. 1974.

91A-3-807. Payment of claims. (1) Upon the expiration of four (4) months from the date of the first publication of the notice to creditors, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid as provided herein may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

(2) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if

(a) the payment was made before the expiration of the time limit stated in subsection (1) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(b) the payment was made, due to the negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

History: En. 91A-3-807 by Sec. 1, Ch. 365, L. 1974.

91A-3-808. Individual liability of personal representative. (1) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity

in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(4) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

History: En. 91A-3-808 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The

claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

91A-3-809. Secured claims. Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(1) if the creditor exhausts his security before receiving payment, unless precluded by other law upon the amount of the claim allowed less the fair value of the security; or

(2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.

History: En. 91A-3-809 by Sec. 1, Ch. 365, L. 1974.

91A-3-810. Claims not due and contingent on unliquidated claims. (1) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(2) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(a) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(b) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

History: En. 91A-3-810 by Sec. 1, Ch. 365, L. 1974.

91A-3-811. Counterclaims. In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

History: En. 91A-3-811 by Sec. 1, Ch. 365, L. 1974.

91A-3-812. Execution and levies prohibited. No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

History: En. 91A-3-812 by Sec. 1, Ch. 365, L. 1974.

91A-3-813. Compromise of claims. When a claim against the estate has been presented in any manner, the personal representative, with the consent of the heirs or devisees or the court may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

History: En. 91A-3-813 by Sec. 1, Ch. 365, L. 1974.

91A-3-814. Encumbered assets. If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

History: En. 91A-3-814 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Section [91A-2-609] establishes a rule of construction against exoneration. Thus,

unless the will indicates to the contrary, a specific devisee of mortgaged property takes subject to the lien without right to have other assets applied to discharge the secured obligation.

91A-3-815. Administration in more than one state—duty of personal representative. (1) All assets of estates being administered in this state are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

(2) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(3) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshaled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

History: En. 91A-3-815 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Under section [91A-3-803(1)(a)], if a local (property only) administration is commenced and proceeds to advertisement for claims before nonclaim statutes have run at domicile, claimants may prove claims in the local administration at any time before the local nonclaim period

expires. [This section] has the effect of subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

91A-3-816. Final distribution to domiciliary personal representative. The estate of a nonresident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile;

(2) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or

(3) the court orders otherwise in a proceeding for a closing order under section 91A-3-1001 or incident to the closing of a supervised adminis-

tration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this article.

History: En. 91A-3-816 by Sec. 1, Ch. 365, L. 1974.

Part 9—Special Provisions Relating to Distribution

- Section
- 91A-3-901. Successors' rights if no administration.
 - 91A-3-902. Distribution—order in which assets appropriated—abatement.
 - 91A-3-903. Successor's indebtedness offset against interest—defenses available.
 - 91A-3-904. Interest on general pecuniary devise.
 - 91A-3-905. Penalty clause for contest.
 - 91A-3-906. Distribution in kind—valuation—method.
 - 91A-3-907. Distribution in kind—evidence.
 - 91A-3-908. Distribution—right or title of distributee.
 - 91A-3-909. Improper distribution—liability of distributee.
 - 91A-3-910. Purchasers from distributees protected.
 - 91A-3-911. Partition for purpose of distribution.
 - 91A-3-912. Private agreements among successors to decedent binding on personal representative.
 - 91A-3-913. Distribution to trustee.
 - 91A-3-914. Disposition of unclaimed assets.
 - 91A-3-915. Distribution to person under disability.
 - 91A-3-916. Apportionment of estate taxes.

91A-3-901. Successors' rights if no administration. In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

History: En. 91A-3-901 by Sec. 1, Ch. 365, L. 1974.

death. See section [91A-3-101]. This section adds little to section [91A-3-101] except to indicate how successors may establish record title in the absence of administration.

Editorial Board Comment

Title to a decedent's property passes to his heirs and devisees at the time of his

91A-3-902. Distribution—order in which assets appropriated—abatement. (1) Except as provided in subsection (2) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

- (a) property not disposed of by the will;
- (b) residuary devises;
- (c) general devises;
- (d) specific devises.

For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in propor-

tion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(2) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (1), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(3) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

History: En. 91A-3-902 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules which may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts con-

cerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection [(2)] directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

91A-3-903. Successor's indebtedness offset against interest—defenses available. The amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

History: En. 91A-3-903 by Sec. 1, Ch. 365, L. 1974.

91A-3-904. Interest on general pecuniary devise. General pecuniary devises bear interest at the legal rate beginning one (1) year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

History: En. 91A-3-904 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common-

law rule in that the right to interest for delayed payment does not depend on whether the estate in fact realized income during the period of delay. The section is consistent with section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

91A-3-905. Penalty clause for contest. A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

History: En. 91A-3-905 by Sec. 1, Ch. 365, L. 1974.

91A-3-906. Distribution in kind—valuation—method. (1) Unless a contrary intention is indicated by the will, the distributable assets of a

decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(a) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in section 91A-2-402 shall receive the items selected.

(b) Any homestead or family allowance or devise payable in money may be satisfied by value in kind provided

(i) the person entitled to the payment has not demanded payment in cash;

(ii) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(iii) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(c) For the purpose of valuation under paragraph (b) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty (30) days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(d) The residuary estate shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.

(2) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty (30) days after mailing or delivery of the proposal.

History: En. 91A-3-906 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section establishes a preference for distribution in kind. It directs a personal representative to make distribution in kind whenever feasible and to convert assets to

cash only where there is a special reason for doing so. It provides a reasonable means for determining value of assets distributed in kind. It is implicit in sections [91A-3-101, 91A-3-901] and this section that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

91A-3-907. Distribution in kind—evidence. If distribution in kind is made, the personal representative shall execute an instrument or deed of

distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

History: En. 91A-3-907 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This and sections following should be read with section [91A-3-708] which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

Under section 3-711 [omitted in Montana] a personal representative's relationship to assets of the estate is described as the "same power over the title to property of the estate as an absolute owner would have." A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of [this section] is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

91A-3-908. Distribution—right or title of distributee. Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

History: En. 91A-3-908 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the

personal representative who made the distribution, or a successor personal representative. Section [91A-3-108] does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see section [91A-3-1005].

91A-3-909. Improper distribution—liability of distributee. Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

History: En. 91A-3-909 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The term "improperly" as used in this section must be read in light of section [91A-3-703] and the manifest purpose of this and other sections of the code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be "authorized at the time" as contemplated by section [91A-3-703] and still be "improper" under this section. Section [91A-3-703] is designed to permit a per-

sonal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

The definition of "distributee" to include the trustee and beneficiary of a testamentary trust in [91A-1-201(11)] is important in allocating liabilities that may arise under sections [91A-3-909 and

91A-3-910] on improper distribution by the personal representative under an informally probated will. The provisions of [91A-3-909 and 91A-3-910] are based

on the theory that liability follows the property and the fiduciary is absolved from liability by reliance upon the informally probated will.

91A-3-910. Purchasers from distributees protected. If property distributed in kind or a security interest therein is acquired by a purchaser, or lender, for value from a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser or lender takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind.

History: En. 91A-3-910 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The words "instrument or deed of distribution" are explained in section [91A-

3-907]. The effect of this section may be to make an instrument or deed of distribution a very desirable link in a chain of title involving succession of land. Cf. section [91A-3-901].

91A-3-911. Partition for purpose of distribution. When two (2) or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one (1) or more of the heirs or devisees may petition the court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

History: En. 91A-3-911 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Ordinarily heirs or devisees desiring partition of a decedent's property will re-

solve the issue by agreement without resort to the courts. (See section [91A-3-912].) If court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.

91A-3-912. Private agreements among successors to decedent binding on personal representative. Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

History: En. 91A-3-912 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by section [91A-2-801] with the effect of agreement under this section. The most obvious difference

is that an agreement among successors under this section would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable.

Differing from a pattern that is familiar in many states, this code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII [omitted in Montana] contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

91A-3-913. Distribution to trustee. (1) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in section 91A-7-303.

(2) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(3) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (1) and (2).

History: En. 91A-3-913 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The reference in subsection (1) to "section 91A-7-303" is erroneous; the Montana enactment omitted section 7-303 of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Editorial Board Comment

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful rele-

vance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the executor. Is he, as executor, not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the executor probably will want the protection of a court order. Sections [91A-3-1001 and 91A-3-1002] provide ample authority for an appropriate proceeding in the court which issued the executor's letters.

In other cases, however, the executor may believe that he may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. The purpose of this section is to make it clear that it is proper for the executor to require the trustee to register the trust and to notify beneficiaries before receiving distribution. Also, the section complements section 7-304 [omitted in Montana] by providing that the personal representative may petition an appropriate court to require that the trustee be bonded.

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. [The] definition of "distributee" [in 91A-1-201(11)] limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by [91A-1-201(11)] the testamentary trustee or

beneficiary of a testamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees [91A-3-1007].

Incident to his standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. He also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he could represent his beneficiaries in compromise settlements in the decedent's estate which would be binding upon him and his beneficiaries. See section [91A-3-912].

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

91A-3-914. Disposition of unclaimed assets. (1) If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise to the department of revenue to be deposited in the state escheat fund as provided in chapter 5, Title 91, R. C. M. 1947, as amended.

(2) Any person having any claim to a share deposited in the state escheat fund under the provisions of this code shall follow the procedures set out in sections 91-501 through 91-526, concerning escheated estates to claim such share.

History: En. 91A-3-914 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

* * *

This section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. See [91A-2-105].

91A-3-915. Distribution to person under disability. A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator, or any other person authorized by this code or otherwise to give a valid receipt and discharge for the distribution.

History: En. 91A-3-915 by Sec. 1, Ch. 365, L. 1974.

portant as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

Editorial Board Comment

Section [91A-5-103] is especially im-

91A-3-916. Apportionment of estate taxes. (1) For purposes of this section:

(a) "estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state;

(b) "person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency;

(c) "person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee;

(d) "state" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico;

(e) "tax" means the federal estate tax and any additional inheritance, estate or death taxes imposed by the laws of any state and interest and penalties imposed in addition to the tax;

(f) "fiduciary" means personal representative or trustee.

(2) Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in this code, the method described in the will controls.

(3)(a) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose may determine the apportionment of the tax.

(b) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (2), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(c) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(d) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this code the determination of the court in respect thereto shall be prima facie correct.

(4)(a) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the

personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this act.

(b) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(5)(a) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax.

(b) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(c) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(d) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(e) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or devise is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (2) hereof, and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(6) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(7) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three (3) months next following final

determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three (3) months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(8) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is *prima facie* correct.

History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

[This section] copies the Uniform Estate Tax Apportionment Act.

Part 10—Closing Estates

Section

- 91A-3-1001. Formal proceedings terminating administration—testate or intestate—order of general protection.
- 91A-3-1002. Formal proceedings terminating testate administration—order construing will without adjudicating testacy.
- 91A-3-1003. Closing estates by sworn statement of personal representative.
- 91A-3-1004. Department of revenue certificate showing taxes paid—prerequisite of closing estate.
- 91A-3-1005. Liability of distributees to claimants.
- 91A-3-1006. Limitations on proceedings against personal representative.
- 91A-3-1007. Limitations on actions and proceedings against distributees.
- 91A-3-1008. Certificate discharging liens securing fiduciary performance.
- 91A-3-1009. Subsequent administration.
- 91A-3-1010. Lien of state on estate property for unpaid inheritance taxes.

91A-3-1001. Formal proceedings terminating administration—testate or intestate—order of general protection. (1) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one (1) year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions,

determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(2) If one (1) or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

History: En. 91A-3-1001 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Subsection [(2)] is derived from § 64 (b) of the Illinois Probate Act (1967). Section [91A-3-106] specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. This section provides a method of curing an oversight in regard to notice which may come to light

before the estate is finally settled. If the person who failed to receive notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefited. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.

See also Comment following section [91A-3-1002].

91A-3-1002. Formal proceedings terminating testate administration—order construing will without adjudicating testacy. A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one (1) year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of section 91A-3-1001.

History: En. 91A-3-1002 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

[This section] permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in regard to testacy. Hence, the heirs in intestacy need not be made parties. Section [91A-3-1001]

permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate. If supervised administration is used, section [91A-3-505] directs that the estate be closed by use of procedures like those described in [section 91A-3-1001]. Of course, testacy will have been adjudicated before time for the closing proceeding if supervised administration is used.

91A-3-1003. Closing estates by sworn statement of personal representative. (1) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than six (6) months after the date of original appointment of a general personal representative for the estate, a verified statement stating that he, or a prior personal representative whom he has succeeded, has or have:

(a) published notice to creditors as provided by section 91A-3-801 and that the first publication occurred more than six (6) months prior to the date of the statement;

(b) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims which were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements which have been made to accommodate outstanding liabilities;

(c) sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby; and

(d) complied with the provisions of section 91A-3-1004.

(2) If no proceedings involving the personal representative are pending in the court one (1) year after the closing statement is filed, the appointment of the personal representative terminates.

History: En. 91A-3-1003 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment added subdivision (1)(d).

Editorial Board Comment

The code uses "termination" to refer to events which end a personal representative's authority. See sections [91A-3-608], et seq. The word "closing" refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up. If the affairs of the personal representative are reviewed and

adjudicated under either sections [91A-3-1001 or 91A-3-1002], the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority. See section [91A-3-610 (2)]. On the other hand, a "closing" statement under [this section] is only an affirmation by the personal representative that he believes the affairs of the estate to be completed. The statement is significant because it reflects that assets have been distributed. Any creditor whose claim, has not been barred and who has not been paid is permitted by section [91A-3-1005] to assert his claim against distributees. The personal representative is also still fully subject

to suit under sections [91A-3-602 and 91A-3-603], for his authority is not "terminated" under section [91A-3-610(2)] until one year after a closing statement is filed. Even if his authority is "terminated," he remains liable to suit unless protected by limitation or unless an adjudication settling his accounts is the reason for "termination." See sections [91A-3-1006 and 91A-3-608].

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding after notice. Sections [91A-3-1001 and 91A-3-1002] describe two proceedings which enable a personal representative to gain protection from all persons or from devisees only. A personal representative who neither obtains a judicial order of protection nor files a closing statement, is protected by [section 91A-3-703] in regard to acts or distributions which were authorized when done but which become doubtful thereafter because of a change in testacy status. On the other questions, the personal representative who

does not take any of the steps described by the code to gain more protection, has no protection against later claims of breach of his fiduciary obligation other than any arising from consent or waiver of individual distributees who may have bound themselves by receipts given to the personal representative.

This section increases the prospects of full discharge of a personal representative who uses the closing statement route over those of a personal representative who relies on receipts. Full protection follows from the running of the six months' limitations period described in [section 91A-3-1006]. But, [the latter section's] protection does not prevent distributees from claiming lack of full disclosure. Hence, it offers little more protection than a receipt. Still, it may be useful to decrease the likelihood of later claim of nondisclosure. Its more significant function, however, is to provide a means for terminating the office of personal representative in a way that will be obvious to third persons.

91A-3-1004. Department of revenue certificate showing taxes paid—prerequisite of closing estate. In all probate proceedings under this code before final distribution to successors is made and before any petition is granted under sections 91A-3-1001, 91A-3-1002, or 91A-3-1003, there shall have been filed with the clerk a certificate from the department of revenue stating that any inheritance tax due on the assets of the estate has been paid. This section shall not prohibit such partial distribution as may become necessary in the course of administration.

History: En. 91A-3-1004 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-3-1005. Liability of distributees to claimants. After assets of an estate have been distributed and subject to section 91A-3-1007, an undischarged claim not barred may be prosecuted in a proceeding against one (1) or more distributees. No distributee shall be liable to claimants for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

History: En. 91A-3-1005 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-1004.

Editorial Board Comment

This section creates a ceiling on the liability of a distributee of "the value of his distribution" as of the time of distribution. The section indicates that each distributee is liable for all that a claimant may prove to be due, provided the claim does not exceed the value of

the defendant's distribution from the estate. But, each distributee may preserve a right of contribution against other distributees. The risk of insolvency of

one or more, but less than all distributees is on the distributee rather than on the claimant.

91A-3-1006. Limitations on proceedings against personal representative.

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six (6) months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

History: En. 91A-3-1006 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-1005.

Editorial Board Comment

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the latter breached any duty

to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of section [91A-3-807]. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use section [91A-3-1001], or, where appropriate, [section 91A-3-1002] to secure greater protection.

91A-3-1007. Limitations on actions and proceedings against distributees.

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of three (3) years after the decedent's death; or one (1) year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

History: En. 91A-3-1007 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-1006.

Editorial Board Comment

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section [91A-3-108] imposes a general limit of three

years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of [91A-3-108] may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See section [91A-3-412]. (3) The limitation of this section ends the possibility of appointment of a per-

sonal representative to correct an erroneous distribution as mentioned in sections [91A-3-1006 and 91A-3-1009]. If there have been no adjudications under section [91A-3-409], or possibly [91A-3-1001 or 91A-3-1002], estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that

attending the estate originally administered.

The last sentence excepting actions or suits to recover property kept from one by the fraud of another may be unnecessary in view of the blanket provision concerning fraud in [Chapter 1]. See section [91A-1-106].

91A-3-1008. Certificate discharging liens securing fiduciary performance. After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the clerk that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

History: En. 91A-3-1008 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a personal representative, or his surety, when, from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. See section [91A-3-607].

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-1007.

91A-3-1009. Subsequent administration. If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one (1) year after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

History: En. 91A-3-1009 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section is consistent with section [91A-3-108] which provides a general period of limitations of three years from death for appointment proceedings, but makes appropriate exception for subsequent administrations.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 3-1008.

91A-3-1010. Lien of state on estate property for unpaid inheritance taxes. All property which is affected by the death of the decedent and on which inheritance, estate or death taxes are due under the laws of this state is subject to the lien of the state of Montana until such taxes have been paid. This lien follows all property sold in the course of administration or distributed under this code until such time as all inheritance taxes have been paid and a receipt showing payment thereof has been filed with

the clerk of court, subject to applicable statutes of limitations on state inheritance tax liens. The department of revenue may issue a consent to transfer any real or personal property in the estate of a decedent free of the lien for unpaid inheritance taxes upon proper application and under such rules and regulations as the department shall prescribe provided that such transfer shall not jeopardize payment of the inheritance taxes due.

History: En. 91A-3-1010 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Part 11—Compromise of Controversies

Section

91A-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

91A-3-1102. Procedure for securing court approval of compromises.

91A-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons. A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

History: En. 91A-3-1101 by Sec. 1, Ch. 365, L. 1974.

91A-3-1102. Procedure for securing court approval of compromises. The procedure for securing court approval of a compromise is as follows: (1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other com-

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petent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

History: En. 91A-3-1102 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section and the one preceding it outline a procedure which may be initiated by competent parties having beneficial interests in a decedent's estate as a means of resolving controversy concerning the estate. If all competent persons with beneficial interests or claims which might be affected by the proposal and parents properly representing interests of their children concur, a settlement scheme differing from that otherwise governing the devolution may be substituted. The procedure for securing representation of minors and unknown or missing persons with interests must be followed. See section [91A-1-403]. The ultimate control of the question of whether the substitute proposal shall be accepted is with the court which must find: "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of parties represented by fiduciaries is just and reasonable."

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trus-

tees from vetoing any such proposal. The only reason for approving a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the court is substituted for that of such fiduciaries in appropriate cases. A controversy which the court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

See section [91A-1-403] for rules governing representatives and appointment of guardians ad litem.

These sections are modeled after section 93 of the Model Probate Code. Comparable legislative provisions have proved quite useful in Michigan. See M.C.L.A. §§ 702.45—702.49.

Part 12—Procedure for Collection of Personal Property by Affidavit, Termination of Joint Tenancies and Life Estates, and Summary Administration Procedure for Small Estates

Section

- 91A-3-1201. Collection of personal property by affidavit.
- 91A-3-1202. Effect of affidavit.
- 91A-3-1203. Small estates—summary administrative procedure.
- 91A-3-1204. Small estates—closing by sworn statement of personal representative.
- 91A-3-1205. Procedures for termination of joint tenancies and life estates.

EDITORIAL BOARD COMMENT

The four sections which follow include two designed to facilitate transfer of small estates without use of a personal representative, and two designed to simplify the duties of a personal representative, who is appointed to handle a small estate. [The fifth section in this part is not part of the Uniform Probate Code.]

The Flexible System of Administration described by earlier portions of [Chapter 3] lends itself well to situations involving small estates. Letters may be obtained quickly without notice or judicial involvement. Immediately, the personal representative is in a position to distribute to successors whose deeds or transfers will protect purchasers. This route accommodates the need for quick and inexpensive transfers of land of small value as well as other assets. Consequently, it was unnecessary to frame complex provisions extending the affidavit procedures to land.

Indeed, transfers via letters of administration may prove to be less troublesome than use of the affidavit procedure. Still, it seemed desirable to provide a quick collection mechanism which avoids all necessity to visit the probate court. For one thing, unpredictable local variations in probate practice may produce situations where the alternative procedure will be very useful. For another, the provision of alternatives is in line with the overall philosophy of [Chapter 3] to provide maximum flexibility.

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than \$15,000. This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people.

91A-3-1201. Collection of personal property by affidavit. (1) Thirty (30) days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(a) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed fifteen hundred dollars (\$1,500);

(b) thirty (30) days have elapsed since the death of the decedent;

(c) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(d) the claiming successor is entitled to payment or delivery of the property.

(2) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (1).

History: En. 91A-3-1201 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect wages and

other small amounts of liquid funds. [This section] goes further in that it allows the collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the code, it is unnecessary to make the provisions regarding small estates applicable to realty.

91A-3-1202. Effect of affidavit. The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any person representative of the estate or to any other person having a superior right.

History: En. 91A-3-1202 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Sections [91A-3-201 and 91A-3-1202] apply to any personal property located in this state whether or not the decedent died domiciled in this state, to any suc-

cessor to personal property located in this state whether or not a resident of this state, and, to the extent that the laws of this state may control the succession to personal property, to personal property wherever located of a decedent who died domiciled in this state.

91A-3-1203. Small estates—summary administrative procedure. If it appears from the inventory and appraisal that the value of the net distributable estate does not exceed one thousand five hundred dollars (\$1,500), or the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 91A-3-1204.

History: En. 91A-3-1203 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment inserted "the value of the net distributable estate does not exceed one thousand five hundred dollars (\$1,500), or the" near the beginning of the section. The compiler substituted the reference to "section 91A-3-1204" for an apparently erroneous reference to "section 91A-3-1202" at the end of the section.

Editorial Board Comment

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the probate estate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates.

91A-3-1204. Small estates—closing by sworn statement of personal representative. (1) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 91A-3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(a) to the best knowledge of the personal representative, the value of the net distributable estate did not exceed one thousand five hundred dollars (\$1,500), or the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent;

(b) the personal representative has fully administered the estate by payment of inheritance taxes and by disbursing and distributing it to the persons entitled thereto; and

(c) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has

furnished a full account in writing of his administration to the distributees whose interests are affected.

(2) If no actions or proceedings involving the personal representative are pending in the court one (1) year after the closing statement is filed, the appointment of the personal representative terminates.

(3) A closing statement filed under this section has the same effect as one filed under section 91A-3-1003.

History: En. 91A-3-1204 by Sec. 1, Ch. 365, L. 1974.

"section 91A-3-1201" and "section 91A-3-1005," respectively.

Compiler's Notes

The Montana enactment inserted "value of the net distributable estate did not exceed one thousand five hundred dollars (\$1,500) or the" in subdivision (1)(a). The compiler substituted the references to "section 91A-3-1203," in the first paragraph of subsection (1), and "section 91A-3-1003" at the end of subsection (3), for apparently erroneous references to

Editorial Board Comment

The personal representative may elect to close the estate under section [91A-3-1002] in order to secure the greater protection offered by that procedure.

The remedies for fraudulent statement provided in section [91A-1-106] of course would apply to any intentional misstatements by a personal representative.

91A-3-1205. Procedures for termination of joint tenancies and life estates. (1) If the inventory in an estate asserts that all or any part of the property listed therein was held by the decedent in joint tenancy or that the decedent held a life estate in any of the property listed, or for any other reason a determination of inheritance tax is required, the personal representative shall file with the department of revenue copies of the instruments by which each such joint tenancy or life estate was created or other interest requiring determination of inheritance tax came into being or other evidence of the existence of such joint tenancy or life estate or other property interest requiring the determination of inheritance tax. The department of revenue shall examine the documents and shall determine the existence of each asserted joint tenancy, life estate or other property interest requiring a determination of inheritance tax.

(2) If it shall be determined that all of the property listed in the inventory was held in joint tenancy or was held by the decedent as a life estate or requires the determination of inheritance tax, or any combination thereof, the department of revenue shall issue its certificate showing that all such property was in joint tenancy or was held as a life estate or requires only the determination of inheritance tax, and stating the names of the surviving owners, remaindermen or possessors thereof or persons entitled to an interest therein. The certificate shall also contain an interlocutory certificate by the department of revenue as to the inheritance tax, if any, due the state of Montana by reason of the death of the decedent. The certificate shall be mailed to the clerk of the appropriate court and to the personal representative. If no dispute exists as to the amount of tax due, if any, the tax shall be paid as provided in the inheritance tax laws of this state. Upon the filing of the receipt showing payment of the tax, the clerk of court shall issue a certificate stating that the joint tenancies or life estates are terminated or other interest in property requiring determination of inheritance tax is properly vested, specifically describing the property and designating the surviving owners or possessors, or

persons entitled to an interest therein. This certificate may be filed in the office of the clerk and recorder of any county in which any such property is located.

(3) (a) If not all the property in the inventory was joint tenancy or life estate property or property requiring only the determination of inheritance tax, the department of revenue shall:

(i) determine the inheritance tax, if any, due to the state of Montana by reason of the death of the decedent and mail its interlocutory certificate to the clerk of the appropriate court and to the personal representative, showing the amount of tax so determined;

(ii) determine what property listed in the inventory was joint tenancy or life estate property or property requiring only the determination of inheritance tax and mail to the clerk of the appropriate court and to the personal representative its certificate describing such joint tenancy and life estate property or property requiring only the determination of inheritance tax and naming the surviving owners or possessors thereof or persons entitled to an interest therein.

(b) If the value of the property not in joint tenancy or held by the decedent as a life estate or requiring only the determination of inheritance tax does not exceed the maximum for summary administration, the personal representative shall proceed under the summary procedure as to the nonjoint tenancy or life estate property which requires more than just the determination of inheritance tax shall pay any inheritance tax and shall file with the appropriate clerk and recorder a certified copy of the department of revenue's list of joint tenancy property.

(c) If the value of the property not held in joint tenancy or as a life estate and not held as property requiring only a determination of inheritance tax does not permit a summary procedure, the personal representative shall proceed under the applicable statutes for administration and distribution and shall include in his decree or instrument of final distribution the list of such joint tenancy or life estate property or property requiring determination of inheritance tax, listing the surviving owners or possessors thereof or persons entitled to an interest therein. Such decree or instrument of final distribution shall be deemed a termination of the joint tenancy or life estate or vesting of the property interest.

(4) If disputes exist as to tax computation, they shall be resolved as provided under the laws applicable to the determination of inheritance taxes.

History: En. 91A-3-1205 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

CHAPTER 4

FOREIGN PERSONAL REPRESENTATIVES—ANCILLARY ADMINISTRATION

Part

1. Definitions, 91A-4-101.
2. Powers of foreign personal representatives, 91A-4-201 to 91A-4-209.
3. Jurisdiction over foreign representatives, 91A-4-301 to 91A-4-303.
4. Judgments and personal representative, 91A-4-401.

EDITORIAL BOARD COMMENT

This [chapter] concerns the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in other states.

Some provisions of the code covering local appointment of personal representatives for nonresidents appear in [Chapter 3]. These include the following: [91A-3-201] (venue), [91A-3-202] (resolution of conflicting claims regarding domicile), [91A-3-203] (priority as personal representative of representative previously appointed at domicile), [91A-3-307(1)] (thirty days delay required before appointment of a local representative for a nonresident), [91A-3-803(1)] (claims barred by nonclaim at domicile before local administration commenced are barred locally) and [91A-3-815] (duty of personal representative in regard to claims where estate is being administered in more than one state). See also [91A-3-308, 91A-3-611(1) and 91A-3-816]. Also, see section [91A-4-209].

The recognition provisions contained in [Chapter 4] and the various provisions of [Chapter 3] which relate to administration of estates of nonresidents are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible.

The first part of [Chapter 4] contains some definitions of particular relevance to estates located in two or more states.

The second part of [Chapter 4] deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. * * * [The text of the Comment discussing the types of power of foreign personal representatives is omitted since the Montana enactment substantially revised the Uniform Probate Code provisions. Cf. sections 4-201 to 4-207 of the Uniform Probate Code as promulgated by the National Conference of Commissioners.]

Part 3 provides for power in the local court over foreign personal representatives who act locally. If a local or ancillary administration has been started, provisions in [Chapter 3] subject the appointee to the power of the court. See section [91A-3-602]. In Part 3 of this [chapter], it is provided that a foreign personal representative submits himself to the jurisdiction of the local court by filing a copy of his appointment to get the powers provided in section [91A-4-207] or by doing any act which would give the state jurisdiction over him as an individual. In addition, the collection of funds as provided in section [91A-4-204] gives the court quasi-in rem jurisdiction over the foreign personal representative to the extent of the funds collected.

Finally, section [91A-4-303] provides that the foreign personal representative is subject to the jurisdiction of the local court "to the same extent that his decedent was subject to jurisdiction immediately prior to death." This is similar to the typical nonresident motorist provision that provides for jurisdiction over the personal representative of a deceased nonresident motorist, see Note, 44 Iowa L.Rev. 384 (1959). It is, however, a much broader provision. * * *

Part 4 of the [chapter] deals with the res judicata effect to be given adjudications for or against a foreign personal representative. Any such adjudication is to be conclusive on a local personal representative "unless it resulted from fraud or collusion . . . to the prejudice of the estate." This provision must be read with section [91A-3-408] which deals with certain out-of-state findings concerning a decedent's estate.

Part 1—Definitions

Section

91A-4-101. Definitions.

91A-4-101. Definitions. In this article :

(1) "Local administration" means administration by a personal representative appointed in this state pursuant to appointment proceedings described in Chapter 3.

(2) "Local personal representative" includes any personal representative appointed in this state pursuant to appointment proceedings described in Chapter 3 and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to section 91A-4-207.

(3) "Resident creditor" means a person domiciled in, or doing business in this state, who is, or could be, a claimant against an estate of a nonresident decedent.

History: En. 91A-4-101 by Sec. 1, Ch. 365, L. 1974.

ence to "section 91A-4-205" at the end of subdivision (2).

Compiler's Notes

The compiler substituted the references to "Chapter 3" for references to "Article III" in subdivisions (1) and (2) and substituted the reference to "section 91A-4-207" for an apparently erroneous refer-

Editorial Board Comment

Section [91A-1-201] includes definitions of "foreign personal representative," "personal representative" and "nonresident decedent."

Part 2—Powers of Foreign Personal Representatives

Section

- 91A-4-201. Filing letters and inventory with local district court—copy to department of revenue.
- 91A-4-202. Determination of inheritance taxes—certificate of department of revenue showing taxes paid, waived or bond posted.
- 91A-4-203. Right to inspect estate assets for inventory.
- 91A-4-204. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.
- 91A-4-205. Payment or delivery discharges.
- 91A-4-206. Resident creditor notice—court order.
- 91A-4-207. Powers of domiciliary foreign personal representative generally—powers as special administrator.
- 91A-4-208. Powers of representatives in transition.
- 91A-4-209. Ancillary and other local administrations—provisions governing.

91A-4-201. Filing letters and inventory with local district court—copy to department of revenue. (1) The domiciliary foreign personal representative of the estate of a nonresident decedent who wishes to receive payment and delivery as described in section 91A-4-204 or to exercise the powers over assets described in section 91A-4-207 shall file in duplicate with a district court in this state in a county in which property belonging to the decedent is located authenticated copies of his appointment and of any official bond he has given, an inventory and appraisal of the property of the nonresident decedent located in this state, which inventory shall contain the information prescribed in section 91A-3-706, and an affidavit stating

- (a) the date of death of the nonresident decedent, and
- (b) that no local administration or application or petition therefor is pending in this state.

(2) Upon receiving the information required by subsection (1), the clerk of court shall issue a certificate to the domiciliary foreign personal representative identifying him as having registered with the district court and stating the name and date of death of the decedent.

(3) The clerk shall also immediately forward a copy of the appointment, affidavit and inventory and appraisal required by subsection (1) to the department of revenue.

History: En. 91A-4-201 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-4-202. Determination of inheritance taxes—certificate of department of revenue showing taxes paid, waived or bond posted. (1) The department of revenue shall determine what inheritance tax, if any, is owing on the property of the nonresident decedent located in this state and shall send notice of the tax owing to the domiciliary foreign personal representative and to the clerk of court.

(2) Upon payment of the inheritance tax due, or if no tax is owing, the department of revenue shall issue a certificate to the domiciliary foreign personal representative indicating that inheritance taxes either are not owing or have been paid and shall send a copy of the certificate to the clerk of court.

(3) The department may issue an order waiving inheritance taxes on a particular item of property under such terms and circumstances as the department shall determine.

(4) Upon the posting by the domiciliary foreign personal representative of satisfactory bond, the department may issue a certificate indicating that bond has been posted sufficient to secure any inheritance tax due on the in-state property of the nonresident decedent. This certificate may be issued at any time after the filing of the inventory with the clerk of court.

History: En. 91A-4-202 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-4-203. Right to inspect estate assets for inventory. Any person holding any property of a nonresident decedent, including any instrument evidencing a debt, obligation, stock or chose in action, shall permit the domiciliary foreign personal representative of the nonresident decedent to inspect and appraise the property for purposes of completing the inventory and appraisal called for in section 91A-4-201(1) upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating

(1) the date of death of the nonresident decedent,

(2) that no local administration or application or petition therefor is pending in this state, and

(3) that the domiciliary foreign personal representative is entitled to make such inspection and appraisal.

History: En. 91A-4-203 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners.

91A-4-204. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration. At any time after the expiration of sixty (60) days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in

action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with a certificate from the clerk of the court for the county where the domiciliary foreign personal representative has filed his affidavit as described in section 91A-4-201 and a certificate from the department of revenue, as described in section 91A-4-202.

History: En. 91A-4-204 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 4-201; the Montana enactment rewrote the section after the words "being presented with" which in the official text reads as follows: "proof of his appointment and affidavit may be by or on behalf of the representative stating:

"(1) the date of the death of the nonresident decedent,

"(2) that no local administration, or application or petition therefor, is pending in this state,

"(3) that the domiciliary foreign personal representative is entitled to payment or delivery."

Editorial Board Comment

Section [91A-3-201(4)] refers to the location of tangible personal estate and intangible personal estate which may be evidenced by an instrument. The instant section includes both categories. Transfer of securities is not covered by this section since that is adequately covered by Section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers.

91A-4-205. Payment or delivery discharges. Payment or delivery made in good faith on the basis of the certificate of the clerk of court and the certificate of the department of revenue releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

History: En. 91A-4-205 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners

is designated as section 4-202; the Montana enactment substituted "certificate of the clerk of court and the certificate of the department of revenue" for "proof of authority and affidavit" in the official text.

91A-4-206. Resident creditor notice—court order. (1) Payment or delivery under section 91A-4-204 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

(2) In cases under subsection (1) the foreign personal representative must seek an order of the court in which he has filed his affidavit to obtain payment or delivery unless the notification by the resident creditor is withdrawn.

History: En. 91A-4-206 by Sec. 1, Ch. 365, L. 1974.

is designated as section 4-203; the Montana enactment added the provisions of subsection (2).

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners

Editorial Board Comment

Similar to provision in Colorado Revised Statute, 153-6-9.

91A-4-207. Powers of domiciliary foreign personal representative generally—powers as special administrator. (1) Except as limited by section

91A-4-206, a domiciliary foreign personal representative who has complied with sections 91A-4-201 and 91A-4-202, may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon non-resident parties generally.

(2) A domiciliary foreign personal representative who has complied with all the requirements of section 91A-4-201(1) except for the filing of an inventory and appraisal, may, when necessary to protect the estate of the decedent and upon appointment by the clerk of court, exercise the powers of a special administrator described in sections 91A-3-614 through 91A-3-618.

History: En. 91A-4-207 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 4-205 and reads as

follows: "A domiciliary foreign personal representative who has complied with section 4-204 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally."

91A-4-208. Powers of representatives in transition. The power of a domiciliary foreign personal representative under section 91A-4-204 or 91A-4-207 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under section 91A-4-207, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

History: En. 91A-4-208 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uni-

form Probate Code as promulgated by the National Conference of Commissioners is designated as section 4-206.

91A-4-209. Ancillary and other local administrations—provisions governing. In respect to a nonresident decedent, the provisions of this code govern (1) proceedings, if any, in a court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and

(2) the status, powers, duties and liabilities of any local personal representative and the rights of claimants, purchasers, distributees and others in regard to a local administration.

History: En. 91A-4-209 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the

National Conference of Commissioners is designated as section 4-207; the Montana enactment substituted "of this code" for "Article III of this code" in subdivision (1).

Editorial Board Comment

The purpose of this section is to direct attention to Article III [reference omitted in Montana], for sections controlling local probates and administrations. * * *

Part 3—Jurisdiction over Foreign Representatives

Section

91A-4-301. Jurisdiction by act of foreign personal representative.

91A-4-302. Jurisdiction by act of decedent.

91A-4-303. Service on foreign personal representative.

91A-4-301. Jurisdiction by act of foreign personal representative. A foreign personal representative by doing any of the acts described in sections 91A-4-201 through 91A-4-207, or by doing any act as a personal representative in this state that would have given the state jurisdiction over him as an individual, submits himself personally to the jurisdiction of the courts of this state in any proceeding relating to the estate.

Jurisdiction which arises solely from receiving payment of money or taking delivery of personal property is limited to the money or value of personal property collected.

History: En. 91A-4-301 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners reads as follows: "A foreign personal representative submits himself to the jurisdiction of the courts of this state by (1) filing authenticated copies of his appointment as provided in section 4-204, (2) receiving payment of money or taking delivery of personal property under section 4-201, or (3) doing any act as a personal representative in this state which would have given this state juris-

diction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected."

Editorial Board Comment

The words "courts of this state" are sufficient under federal legislation to include a federal court having jurisdiction in the adopting state.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration proceeding. See section [91A-3-203(7)]. Once appointed, a local personal representative remains subject to the jurisdiction of the appointing court under section [91A-3-602].

91A-4-302. Jurisdiction by act of decedent. In addition to jurisdiction conferred by section 91A-4-301, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

History: En. 91A-4-302 by Sec. 1, Ch. 365, L. 1974.

91A-4-303. Service on foreign personal representative. (1) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(2) If service is made upon a foreign personal representative as provided in subsection (1), he shall be allowed at least thirty (30) days within which to appear or respond.

History: En. 91A-4-303 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may

not be available to reach certain addresses, 39 C.F.R. Sec. 51.3(c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5(c) (rural delivery) and (d) (star route delivery).

Part 4—Judgments and Personal Representative

Section

91A-4-401. Effect of adjudication for or against personal representative.

91A-4-401. Effect of adjudication for or against personal representative. An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.

History: En. 91A-4-401 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Adapted from Uniform Ancillary Administration of Estates Act, Section 8.

CHAPTER 5

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

Part

1. General provisions, 91A-5-101 to 91A-5-104.
2. Guardians of minors, 91A-5-201 to 91A-5-212.
3. Guardians of incapacitated persons, 91A-5-301 to 91A-5-313.
4. Protection of property of persons under disability and minors, 91A-5-401 to 91A-5-431.
5. Powers of attorney, 91A-5-501, 91A-5-502.

EDITORIAL BOARD COMMENT

[Chapter 5] * * * embodies separate systems of guardianship to protect persons of minors and mental incompetents. It also includes provisions for a type of power of attorney that does not terminate on disability of the principal which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 4 of the [chapter] offers a system of protective proceedings, including conservatorships, to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the [chapter] contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. Another is a facility of payment provision which permits relatively small sums owed to a minor to be paid whether or not there is a guardian or other official who has been designated to act for the minor. A new device tending to simplify necessary protective proceedings, is found in provisions in Part 4 which permit a judge to make appropriate orders concerning the property of a disabled person without appointing a fiduciary.

The highspots of the several parts of [Chapter 5], considered in somewhat more detail, include the following:

(a) The facility of payment clause, which is section [91A-5-103], permits one owing up to \$5,000 per year to a minor to be validly discharged by payment to

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the minor, if he is over eighteen or married, to the minor's parent or grandparent or other adult with whom the minor resides, to a guardian, or by deposit in an account in the name of the minor.

(b) A provision in Part 2 permits the surviving parent of a minor to designate a guardian by will. A similar provision in Part 3 authorizes a parent or spouse to designate a guardian for an incapacitated person by will. Such designation becomes effective upon probate of the will and the filing of an acceptance by the guardian. Thereafter the status of guardian and ward arises. It is like guardianship of the person, rather than of estate. It is described as a parental relationship without the parental obligation of support. The relationship follows the guardian and ward and is properly recognized and implemented, as and when necessary, by the courts of any jurisdiction where these persons may be located. No requirement of periodic reports or accounts is imposed on a testamentary guardian. The question of his proper expenditure of the small sums which he may receive for the ward is left to be settled by the guardian and ward after the ward attains full age. If the amounts involved become more than the guardian cares to be responsible for on this basis, he or any other interested person may seek the appointment of a property manager who is called a "conservator" by the code. The guardian may be eligible to be appointed to this position.

Part 2 also permits a testamentary guardian of a minor to receive and expend sums payable to the minor for the minor's support and education without court order. He may not pay himself for services, however, and is under a duty to deposit excess funds, or to seek a suitable property-protection order if other management is needed.

(c) A parent or guardian is permitted to delegate his authority for short periods as necessitated by anticipated absence or incapacity.

(d) As previously mentioned, Part 4 . . . deals with protective proceedings designed to permit substantial property interests of minors and others unable properly to manage their own affairs to be controlled by court order or managed by a conservator appointed by the court. The causes for inability of owner-management that are listed by the statute are quite broad. Technical incompetency is but one of several reasons why one may be unable to manage his affairs. See section [91A-5-401(2)]. The draftsmen's view was that reliance should be placed on the fact that the court applying the statute would be a full power court and on the various procedural safeguards, including a right to jury trial, to protect against unwise use of the proceedings, rather than to attempt to state and rely upon a narrow or technical test of lack of ability.

Section [91A-5-409] is important, for it makes it clear that a court entertaining a protective proceeding has full power, through its orders, to do anything the protected person himself might have done if not disabled. Another provision broadens the form of relief so that the court may handle a single transaction, like renewal of a mortgage, or a sale and related investment of proceeds, which is recommended in respect to the affairs of a protected person directly by its orders rather than through the appointment of a conservator.

(e) If a conservator is appointed, provisions in Part 4 of the draft give him broad powers of management that may be exercised without a court order. On the other hand, provision is made for restricting the managerial or distribution powers of a conservator, provided notation of the restriction appears on his letters of appointment. Unless restricted, the fiduciary may be able to distribute and end the arrangement without court order if he can meet the terms of the Act. Among other kinds of expenditures and disbursements authorized, payments for the support and education of the protected person as determined by a guardian of the protected person, if any, or by the conservator, if there is no guardian, are approved. Also, certain payments for the support of dependents of the protected person are approved by the code and hence would require no special approval.

(f) Other provisions in Part 4 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator. Claims are handled by the conservator who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common-law rule that contracts of a guardian are his personal responsibility. A conservator is not liable personally on contracts made for the estate unless he agrees to such liability. A section buttresses the managerial powers given to conservator by protecting all persons who deal with them.

(g) Another section seeks to reduce the importance of state lines in respect to the authority of conservators by permitting appointees of foreign courts to act locally. Also, it follows the pattern of [Chapter 3] dealing with ancillary administration of decedents' estates by giving the conservator appointed at the domicile of the protected person priority for appointment locally in case local administration of a protected person's assets becomes necessary.

(h) The many states which have adopted the Uniform Veterans Guardianship Act [secs. 91-4801 et seq., repealed effective July 1, 1975] now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. It is sometimes difficult to ascertain whether a person has ever received a benefit from the Veterans Administration and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration. Part 4 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

Part 1—General Provisions

Section

- 91A-5-101. Definitions and use of terms.
 91A-5-102. Jurisdiction of subject matter—consolidation of proceedings.
 91A-5-103. Facility of payment or agreement.
 91A-5-104. Delegation of powers by parent or guardian.

91A-5-101. Definitions and use of terms. Unless otherwise apparent from the context, in this code:

(1) "incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person;

(2) "protective proceeding" means a proceeding under the provisions of section 91A-5-401 to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief;

(3) "protected person" means a minor or other person for whom a conservator has been appointed or other protective order has been made;

(4) "ward" means a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

History: En. 91A-5-101 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

"Conservator," "estate," "guardian," and "minor," and other terms having relevance to [Chapter 5], are defined in

[91A-1-201]. "Disability" as defined in section [91A-1-201(10)] keys to an adjudication for the causes listed in section [91A-5-401]. The definition of "incapacitated" on the other hand contains the bases for appointment of a guardian under section 91A-5-303].

91A-5-102. Jurisdiction of subject matter—consolidation of proceedings. (1) The court has jurisdiction over protective proceedings and guardianship proceedings.

(2) When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

History: En. 91A-5-102 by Sec. 1, Ch. 365, L. 1974.

91A-5-103. Facility of payment or agreement. Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding five thousand dollars (\$5,000) per annum, by paying or delivering the money or property to:

(1) the minor, if he has attained the age of eighteen (18) years or is married;

(2) any person having the care and custody of the minor with whom the minor resides;

(3) a guardian of the minor; or

(4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor.

This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the minor or any financial institution under (4) above, receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor must be turned over to the minor when he attains majority. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application thereof.

History: En. 91A-5-103 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Where a minor has only a small amount of property, it would be wasteful to require protective proceedings to deal with the property. This section makes it possible for other persons, such as the guardian, to handle the less complicated property affairs of the ward. Protective proceedings, including the possible establishment of a conservatorship, will be sought where substantial property is involved.

This section does not go as far as many facility of payment provisions found in trust instruments which usually permit application of sums due minor beneficiary to any expense or charge for the minor. It was felt that a grant of so large an area of discretion to any category of person who might owe funds to a minor would be unwise. Nonetheless, the section as drafted should reduce the need for trust facility of payment provision somewhat, while extending opportunities to insurance companies and other debtors to minors for relatively simple methods of gaining discharge.

91A-5-104. Delegation of powers by parent or guardian. A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six (6) months, any of his powers regarding care, custody, or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward.

History: En. 91A-5-104 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are

away. Using this section, they could execute an appropriate power of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

Part 2—Guardians of Minors

Section

- 91A-5-201. Status of guardian of minor—general.
- 91A-5-202. Testamentary appointment of guardian of minor.
- 91A-5-203. Objection by minor of fourteen (14) or older to testamentary appointment.
- 91A-5-204. Court appointment of guardian of minor—conditions for appointment.
- 91A-5-205. Court appointment of guardian of minor—venue.
- 91A-5-206. Court appointment of guardian of minor—qualifications—priority of guardian's nominee.
- 91A-5-207. Court appointment of guardian of minor—procedure.
- 91A-5-208. Consent to service by acceptance of appointment—notice.
- 91A-5-209. Powers and duties of guardian of minor.
- 91A-5-210. Termination of appointment of guardian—general.
- 91A-5-211. Proceedings subsequent to appointment—venue.
- 91A-5-212. Resignation or removal proceedings.

91A-5-201. Status of guardian of minor—general. A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward.

History: En. 91A-5-201 by Sec. 1, Ch. 365, L. 1974.

91A-5-202. Testamentary appointment of guardian of minor. The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under section 91A-5-203, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated, if before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile. Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care or to his nearest adult relations.

History: En. 91A-5-202 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment added the last sentence of this section.

91A-5-203. Objection by minor of fourteen (14) or older to testamentary appointment. A minor of fourteen (14) or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the

court in which the will is probated a written objection to the appointment before it is accepted or within thirty (30) days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee, or any other suitable person.

History: En. 91A-5-203 by Sec. 1, Ch. 365, L. 1974.

91A-5-204. Court appointment of guardian of minor—conditions for appointment. The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order. A guardian appointed by will as provided in section 91A-5-202 whose appointment has not been prevented or nullified under 91A-5-203 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within thirty (30) days after notice of the guardianship proceeding.

History: En. 91A-5-204 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The words "all parental rights of custody" are to be read with sections [91A-5-201 and 91A-5-209] which give testamentary and court-appointed guardians of minors certain parental rights respecting the minor. Hence, no authority to appoint a guardian for a minor exists if a

testamentary guardian has accepted an effective appointment by will. The purpose of this restriction is to support and encourage testamentary appointments which may occur without judicial act. If a testamentary guardian proves to be unsatisfactory, removal proceedings as provided in section [91A-5-211] may be used if the objection device of section [91A-5-203] is unavailable.

91A-5-205. Court appointment of guardian of minor—venue. The venue for guardianship proceedings for a minor is in the place where the minor resides or is present.

History: En. 91A-5-205 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Section [91A-1-303] provides for conflicts of venue and for transfer of venue.

91A-5-206. Court appointment of guardian of minor—qualifications—priority of guardian's nominee. The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is fourteen (14) years of age or older, unless the court finds the appointment contrary to the best interests of the minor.

History: En. 91A-5-206 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Rather than provide for priorities among various classes of relatives, it was felt that the only priority should be for the person nominated by the minor. The important point is to locate someone whose appointment will be in the best interests of the minor. If there is contention among relatives over who should be named, it is not likely that a statu-

tory priority keyed to degrees of kinship would help resolve the matter. For example, if the argument involved a squabble between relatives of the child's father and relatives of its mother, priority in terms of degrees of kinship would be useless.

Guardianships under this code are not likely to be attractive positions for persons who are more interested in handling a minor's estate than in his personal well-being. An order of a court having equity power is necessary if the

guardian is to receive payment for services where there is no conservator for the minor's estate. Also, the powers of management of a ward's estate conferred on a

guardian are restricted so that if a substantial estate is involved, a conservator will be needed to handle the financial matters.

91A-5-207. Court appointment of guardian of minor—procedure. (1) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by section 91A-1-401 to:

- (a) the minor, if he is fourteen (14) or more years of age;
- (b) the person who has had the principal care and custody of the minor during the sixty (60) days preceding the date of the petition; and
- (c) any living parent of the minor.

(2) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 91A-5-204 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

(3) If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six (6) months.

(4) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen (14) years of age or older.

History: En. 91A-5-207 by Sec. 1, Ch. 365, L. 1974.

91A-5-208. Consent to service by acceptance of appointment—notice. By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian, or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

History: En. 91A-5-208 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The "long-arm" principle behind this section is well established. It seems desirable that the court in which acceptance is filed be able to serve its process on the guardian wherever he has moved. The continuing interest of that court in

the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

91A-5-209. Powers and duties of guardian of minor. A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a

guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties:

(1) He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(2) He may receive money payable for the support of the ward to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. He also may receive money or property of the ward paid or delivered by virtue of section 91A-5-103. Any sums so received shall be applied to the ward's current needs for support, care and education. He must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator. Sums so received by the guardian are not to be used for compensation for his services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(3) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. A guardian may consent to the marriage or adoption of his ward.

(4) A guardian must report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule.

History: En. 91A-5-209 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

See section [91A-5-212]. See, also, sec-

tion [91A-5-424(1)] which confers the powers of a guardian on a conservator who is responsible for the estate of a minor under eighteen for whom no guardian has been named.

91A-5-210. Termination of appointment of guardian—general. A guardian's authority and responsibility terminates upon the death, resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

History: En. 91A-5-210 by Sec. 1, Ch. 365, L. 1974.

91A-5-211. Proceedings subsequent to appointment—venue. (1) The court where the ward resides has concurrent jurisdiction with the court

which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(2) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

History: En. 91A-5-211 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Under section [91A-1-302], the court is designated as the proper court to handle matters relating to guardianship. The present section is intended to give jurisdiction to the forum where the ward resides as well as to the one where ap-

pointment initiated. This has primary importance where the ward's residence has been moved from the appointing state. Because the court where acceptance of appointment is filed may as a practical matter be the only forum where jurisdiction over the person of the guardian may be obtained (by reason of section [91A-5-208]), that court is given concurrent jurisdiction.

91A-5-212. Resignation or removal proceedings. (1) Any person interested in the welfare of a ward, or the ward, if fourteen (14) or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(2) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(3) If, at any time in the proceeding, the court determines that the interests of the ward are, or may be, inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen (14) or more years of age.

History: En. 91A-5-212 by Sec. 1, Ch. 365, L. 1974.

Part 3—Guardians of Incapacitated Persons

Section

- 91A-5-301. Testamentary appointment of guardian for incapacitated person.
- 91A-5-302. Venue.
- 91A-5-303. Procedure for court appointment of a guardian of an incapacitated person.
- 91A-5-304. Findings—order of appointment.
- 91A-5-305. Acceptance of appointment—consent to jurisdiction.
- 91A-5-306. Termination of guardianship for incapacitated person.
- 91A-5-307. Removal or resignation of guardian—termination of incapacity.
- 91A-5-308. Visitor in guardianship proceedings.
- 91A-5-309. Notices in guardianship proceedings.
- 91A-5-310. Temporary guardians.
- 91A-5-311. Who may be guardian—priorities.
- 91A-5-312. General powers and duties of guardian.
- 91A-5-313. Proceedings subsequent to appointment—venue.

91A-5-301. Testamentary appointment of guardian for incapacitated person. (1) The parent of an incapacitated person may by will appoint a

guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given seven (7) days' prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(2) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given seven (7) days' prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

(3) This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

(4) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the sections 91A-5-302 through 91A-5-313, inclusive.

History: En. 91A-5-301 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section, modeled after section [91A-5-205], is designed to give the surviving parent, or the spouse, of an incapacitated person, the ability to confer the authority of a guardian on a person designated by will. This opportunity may be most useful in cases where parents, during their lifetime, have arranged an informal or voluntary commitment of an incompetent child, and are anxious to designate another who can maintain contact with the patient and act on his be-

half without the necessity of a sanity hearing. The person designated by will must act by filing acceptance of the appointment. This provides a check against will directions which might prove to be unwise or unnecessary after the parents' death. Moreover, the testamentary designee will have the risk of the possibility that the ward is not in fact incapacitated to prevent him from using the authority conferred to restrain the liberty of the ward. In cases of doubt, the testamentary appointee should petition for a court appointment under section [91A-5-303].

91A-5-302. Venue. The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

History: En. 91A-5-302 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Venue in guardianship proceedings lies in the county where the incapacitated

person is present, as well as where he resides. Thus, if the person is temporarily away from his county of usual abode, the court of the county where he happens to be may handle requests for guardianship proceedings relating to him. In protective

proceedings, venue is normally in the county of residence. See section [91A-5-403]. See section [91A-1-303] for disposition when venue is in two counties, and for transfer of venue.

91A-5-303. Procedure for court appointment of a guardian of an incapacitated person. (1) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician appointed by the court who shall submit his report in writing to the court and be interviewed by a visitor sent by the court. The visitor also shall interview the person seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests.

History: En. 91A-5-303 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The procedure here is similar to, but not precisely the same as, protective proceedings for certain disabled persons. It is not required that the visitor be a

lawyer. In urban areas, the visitor may be a social worker capable of determining the needs of the person for whom the appointment is sought. By brackets, the National Conference indicates that enacting states should decide whether it is appropriate to create a right to jury trial. [Montana provides a right to jury trial.]

91A-5-304. Findings—order of appointment. The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

History: En. 91A-5-304 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The purpose of guardianship is to provide for the care of a person who is unable to care for himself. There is no reason to seek a guardian in those situations where the problems to be dealt with center around the property of a disabled person. In that event, a protective proceeding under Part 4 may be in order.

It is assumed that the standards suggested by the definition in section [91A-5-101] for the "incapacitated" person are different from those which will determine when a person may be committed as mentally ill. For example, involuntary commitment proceedings may well be inappropriate unless it is determined that the patient is or probably will become dangerous to himself or the person or property of others. As indicated in [91A-5-101], the meaning of "incapacitated"

turns on whether the subject lacks "understanding or capacity to make or communicate responsible decisions concerning his person." There is overlap between the two sets of standards, but they are different. Hence, a finding that a person is "incapacitated" does not amount to a finding that he is mentally ill, or can be committed. In the reverse situation, if a person has been committed to institutional care and custody because of mental illness, it may be unnecessary to appoint a guardian for him. Nonetheless, it may be desirable to have a personal guardian for one who is or may be committed or who will be cared for by an institution. For one thing, a guardian,

having custody, might arrange for a voluntary care arrangement like that which a parent for a minor and incapacitated child could establish. Moreover, the limited authority of a guardian over property of his ward may be appropriate in cases where the ward is committed. Because of the relationship between existing guardianship legislation and the handling of committed persons appears to vary considerably from state to state, the code was deliberately left rather general on points relevant to the relationship. Section [91A-5-312] qualifies the power of a guardian to determine the place of residence of a ward who has been committed.

91A-5-305. Acceptance of appointment—consent to jurisdiction. By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner.

History: En. 91A-5-305 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The proceedings under [Chapter 5] are flexible. The court should not appoint a guardian unless one is necessary or desirable for the care of the person. If it develops that the needs of the person who

is alleged to be incapacitated are not those which would call for a guardian, the court may adjust the proceeding accordingly. By acceptance of the appointment, the guardian submits to the court's jurisdiction in much the same way as a personal representative. Cf. [section 91A-3-602].

91A-5-306. Termination of guardianship for incapacitated person. The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in section 91A-5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

History: En. 91A-5-306 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The Montana enactment added the last sentence of this section.

91A-5-307. Removal or resignation of guardian—termination of incapacity. (1) On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(2) An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition for an order that he is no longer incapacitated, and for re-

removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(3) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

History: En. 91A-5-307 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The ward's incapacity is a question

that may usually be reviewed at any time. However, provision is made for a discretionary restriction on review. In all review proceedings, the welfare of the ward is paramount.

91A-5-308. Visitor in guardianship proceedings. A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing or social work and is an officer, employee or special appointee of the court with no personal interest in the proceedings.

History: En. 91A-5-308 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The visitor should have professional

training and should not have a personal interest in the outcome of the guardianship proceedings.

91A-5-309. Notices in guardianship proceedings. (1) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(a) the ward or the person alleged to be incapacitated and his spouse, parents and adult children;

(b) any person who is serving as his guardian, conservator or who has his care and custody; and

(c) in case no other person is notified under (a), at least one (1) of his closest adult relatives, if any can be found.

(2) Notice shall be served personally on the alleged incapacitated person, and his spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in section 91A-1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

History: En. 91A-5-309 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The persons entitled to notice in guardianship proceeding are usually fewer in

number than those in a protective proceeding. Cf. [section 91A-5-405]. Required notice shall be given in accordance with the general notice provision of the code. See section [91A-1-401].

91A-5-310. Temporary guardians. If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed six (6) months. A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this code concerning guardians apply to temporary guardians.

History: En. 91A-5-310 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The temporary guardian is analogous to a special administrator under sections [91A-3-614 through 91A-3-618]. His ap-

pointment would be obtained in emergency situations or as a protective device against default by a guardian. The temporary guardian has all the powers of a guardian, except as the order appointing him may provide otherwise.

91A-5-311. Who may be guardian—priorities. (1) Any competent person or a suitable institution may be appointed guardian of an incapacitated person.

(2) Persons who are not disqualified have priority for appointment as guardian in the following order:

- (a) the spouse of the incapacitated person;
- (b) an adult child of the incapacitated person;
- (c) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (d) any relative of the incapacitated person with whom he has resided for more than six (6) months prior to the filing of the petition;
- (e) a person nominated by the person who is caring for him or paying benefits to him.

History: En. 91A-5-311 by Sec. 1, Ch. 365, L. 1974.

91A-5-312. General powers and duties of guardian. (1) A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(a) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state.

(b) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate,

arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(c) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

(d) If no conservator for the estate of the ward has been appointed, he may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one (1) of the next of kin of the incompetent ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(e) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule.

(f) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

(2) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

History: En. 91A-5-312 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The guardian is responsible for the care of the person of his ward. This section gives him the powers necessary to carry out this responsibility. Where there are no protective proceedings, the guardian also has limited authority over the

property of the ward. Where the ward has substantial property, it may be desirable to have protective proceedings to handle his property problems. The same person, of course, may serve as guardian and conservator. Section [91A-5-408] authorizes the court to make preliminary orders protecting the estate once a petition for appointment of a conservator is filed.

91A-5-313. Proceedings subsequent to appointment—venue. (1) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(2) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

History: En. 91A-5-313 by Sec. 1, Ch. 365, L. 1974.

Part 4—Protection of Property of Persons Under Disability and Minors

Section	
91A-5-401.	Protective proceedings.
91A-5-402.	Protective proceedings—jurisdiction of affairs of protected persons.
91A-5-403.	Venue.
91A-5-404.	Original petition for appointment or protective order.
91A-5-405.	Notice.
91A-5-406.	Protective proceedings—request for notice—interested person.
91A-5-407.	Procedure concerning hearing and order on original petition.
91A-5-408.	Permissible court orders.
91A-5-409.	Protective arrangements and single transactions authorized.
91A-5-410.	Who may be appointed conservator—priorities.
91A-5-411.	Bond.
91A-5-412.	Terms and requirements of bond.
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91A-5-414.	Compensation and expenses.
91A-5-415.	Death, resignation or removal of conservator.
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91A-5-417.	Conservator to act as fiduciary.
91A-5-418.	Inventory and records.
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91A-5-421.	Recording conservator's letters.
91A-5-422.	Sale, encumbrance or transaction involving conflict of interest—voidable—exceptions.
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91A-5-424.	Powers of conservator in administration.
91A-5-425.	Distributive powers and duties of conservator.
91A-5-426.	Enlargement or limitation of powers of conservator.
91A-5-427.	Preservation of estate plan.
91A-5-428.	Claims against protected person—enforcement.
91A-5-429.	Individual liability of conservator.
91A-5-430.	Termination of conservatorship.
91A-5-431.	Payment of debt and delivery of property to foreign conservator without local proceedings.

91A-5-401. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

(1) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(a) the person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(b) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

History: En. 91A-5-401 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This is the basic section of this part providing for protective proceedings for minors and disabled persons. "Protective proceedings" is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. "Disabled persons" is used in this section to include a broad category of persons who, for a variety of different rea-

sons, may be unable to manage their own property. Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

The Comment to section [91A-5-304], *supra*, points up the different meanings of **incapacity** (warranting guardianship), and **disability**.

91A-5-402. Protective proceedings—jurisdiction of affairs of protected persons. After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim.

History: En. 91A-5-402 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

While the bulk of all judicial proceedings involving the conservator will be in the court supervising the conserva-

torship third parties may bring suit against the conservator or the protected person on some matters in other courts. Claims against the conservator after his appointment are dealt with by section [91A-5-428].

91A-5-403. Venue. Venue for proceedings under this part is:

(1) in the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or

(2) if the person to be protected does not reside in this state, in any place where he has property.

History: En. 91A-5-403 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Venue for protective proceedings lies in the county of residence (rather than domicile) or, in the case of the non-

resident, where his property is located. Unitary management of the property is obtainable through easy transfer of proceedings (section [91A-1-303(2)]) and easy collection of assets by foreign conservators (section [91A-5-431]).

91A-5-404. Original petition for appointment or protective order.

(1) The person to be protected, any person who is interested in his estate, affairs or welfare including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

(2) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

History: En. 91A-5-404 by Sec. 1, Ch. 365, L. 1974.

91A-5-405. Notice. (1) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceeding at least fourteen (14) days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with section 91A-1-401. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(2) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under section 91A-5-406 and to interested persons and other persons as the court may direct. Except as otherwise provided in (1), notice shall be given in accordance with section 91A-1-401.

History: En. 91A-5-405 by Sec. 1, Ch. 365, L. 1974.

91A-5-406. Protective proceedings — request for notice — interested person. Any interested person who desires to be notified before any order is made in a protective proceeding may file with the clerk a request for notice subsequent to payment of any fee required by statute or court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request is not effective unless it contains a statement

showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

History: En. 91A-5-406 by Sec. 1, Ch. 365, L. 1974.

91A-5-407. Procedure concerning hearing and order on original petition. (1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if fourteen (14) years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing.

Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(3) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

History: En. 91A-5-407 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The section establishes a framework within which professionals, including the judge, attorney and physician, if any, may

be expected to exercise good judgment in regard to the minor or disabled person who is the subject of the proceeding. The National Conference accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment.

91A-5-408. Permissible court orders. The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without

other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family and members of his household.

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to, power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The court may exercise or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding twenty per cent (20%) of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

(5) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person.

History: En. 91A-5-408 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The court, which is supervising a conservatorship, is given all the powers which the individual would have if he were of

full capacity. These powers are given to the court that is managing the protected person's property since the exercise of these powers has important consequences with respect to the protected person's property.

91A-5-409. Protective arrangements and single transactions authorized. (1) If it is established in a proper proceeding that a basis exists as described in section 91A-5-401 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract,

a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(2) When it has been established in a proper proceeding that a basis exists as described in section 91A-5-401 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

(3) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

History: En. 91A-5-409 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

It is important that the provision be made for the approval of single transactions or the establishment of protective

arrangements as alternatives to full conservatorship. Under present law, a guardianship often must be established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

91A-5-410. Who may be appointed conservator—priorities. (1) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(a) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(b) an individual or corporation nominated by the protected person if he is fourteen (14) or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(c) the spouse of the protected person;

(d) an adult child of the protected person;

(e) a parent of the protected person, or a person nominated by the will of a deceased parent;

(f) any relative of the protected person with whom he has resided for more than six (6) months prior to the filing of the petition;

(g) a person nominated by the person who is caring for him or paying benefits to him.

(2) A person in priorities (a), (c), (d), (e), or (f) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

History: En. 91A-5-410 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

A flexible system of priorities for ap-

pointment as conservator has been provided. A parent may name a conservator for his minor children in his will if he deems this desirable.

91A-5-411. Bond. The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one (1) year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

History: En. 91A-5-411 by Sec. 1, Ch. 365, L. 1974.

are somewhat more strict than the requirements for personal representatives. Cf. section [91A-3-603].

Editorial Board Comment

The bond requirements for conservators

91A-5-412. Terms and requirements of bond. (1) The following requirements and provisions apply to any bond required under section 91A-5-411:

(a) unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

(b) by executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner;

(c) on petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

(d) the bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(2) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

History: En. 91A-5-412 by Sec. 1, Ch. 365, L. 1974.

91A-5-413. Acceptance of appointment—consent to jurisdiction. By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may

be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

History: En. 91A-5-413 by Sec. 1, Ch. 365, L. 1974.

91A-5-414. Compensation and expenses. If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

History: En. 91A-5-414 by Sec. 1, Ch. 365, L. 1974.

91A-5-415. Death, resignation or removal of conservator. The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

History: En. 91A-5-415 by Sec. 1, Ch. 365, L. 1974.

National Conference of Commissioners contains a second sentence reading: "After his death, resignation or removal the court may appoint another conservator."

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the

91A-5-416. Petitions for orders subsequent to appointment. (1) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order

- (a) requiring bond or security or additional bond or security, or reducing bond,
- (b) requiring an accounting for the administration of the trust,
- (c) directing distribution,
- (d) removing the conservator and appointing a temporary or successor conservator, or
- (e) granting other appropriate relief.

(2) A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

(3) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

(4) For purposes of this section, any person, institution or agency which is furnishing or supplying any money for support or care of a person for whom a conservator has been appointed is a person interested in the welfare of such protected person.

History: En. 91A-5-416 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Once a conservator has been appointed, the court supervising the trust acts only upon the request of some moving party.

Compiler's Notes

The Montana enactment added the provision designated as subsection (4).

91A-5-417. Conservator to act as fiduciary. In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees.

History: En. 91A-5-417 by Sec. 1, Ch. 365, L. 1974.

91A-5-418. Inventory and records. Within ninety (90) days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of fourteen (14) years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

History: En. 91A-5-418 by Sec. 1, Ch. 365, L. 1974.

91A-5-419. Accounts. Every conservator must account to the court for his administration of the trust upon his resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

History: En. 91A-5-419 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The persons who are to receive notice of intermediate and final accounts will

be identified by court order as provided in section [91A-5-405(2)]. Notice is given as described in [91A-1-401]. In other respects, procedures applicable to accountings will be as provided in court rule.

91A-5-420. Conservators—title by appointment. The appointment of a conservator vests in his title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

History: En. 91A-5-420 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section permits independent administration of the property of protected persons once the appointment of a conservator had been obtained. Any interested person may require the conservator to account in accordance with section [91A-5-419]. As a trustee, a conservator holds title to the property of the protected per-

son. The appointment of a conservator is a serious matter and the court must select him with great care. Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

91A-5-421. Recording conservator's letters. Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or his successors. Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be filed or recorded to give record notice of title as between the conservator and the protected person.

History: En. 91A-5-421 by Sec. 1, Ch. 365, L. 1974.

91A-5-422. Sale, encumbrance or transaction involving conflict of interest—voidable—exceptions. Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

History: En. 91A-5-422 by Sec. 1, Ch. 365, L. 1974.

91A-5-423. Persons dealing with conservators—protection. A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in section 91A-5-408, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in section 91A-5-426 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

History: En. 91A-5-423 by Sec. 1, Ch. 365, L. 1974.

91A-5-424. Powers of conservator in administration. (1) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor under the age of eighteen (18) years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in section 91A-5-209 until the minor attains the age of eighteen (18) or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by sections 91A-5-201 through 91A-5-212, inclusive.

(2) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(3) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, to

(a) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(b) receive additions to the estate;

(c) continue or participate in the operation of any business or other enterprise;

(d) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(e) invest and reinvest estate assets in accordance with subsection (2);

(f) deposit estate funds in a bank including a bank operated by the conservator;

(g) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(h) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(i) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(j) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(k) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(l) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(m) vote a security, in person or by general or limited proxy;

(n) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(o) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(p) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(q) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(r) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(s) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(t) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(u) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(v) pay any sum distributable to a protected person or a dependent of the person who is a minor or incompetent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(w) employ persons, including attorneys, auditors, investment advisers, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one (1) or more agents to perform any act of administration, whether or not discretionary;

(x) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(y) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

History: En. 91A-5-424 by Sec. 1, Ch. 365, L. 1974.

91A-5-425. Distributive powers and duties of conservator. (1) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents in accordance with the following principles:

(a) The conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(b) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to

(i) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him;

(ii) the accustomed standard of living of the protected person and members of his household;

(iii) other funds or sources used for the support of the protected person.

(c) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(d) Funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(2) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make in amounts which do not exceed in total for any year twenty per cent (20%) of the income from the estate.

(3) When a minor who has not been adjudged disabled under section 91A-5-401(2) attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(4) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting

all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(5) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after forty (40) days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under section 91A-3-204 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in section 91A-3-308 and sections 91A-3-601 through 91A-3-1010, inclusive, except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

History: En. 91A-5-425 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section sets out those situations wherein the conservator may distribute property or disburse funds during the

continuance of or on termination of the trust. Section [91A-5-416(2)] makes it clear that a conservator may seek instructions from the court on questions arising under this section. Subsection [(5)] is derived in part from § 11.80.150 Revised Code of Washington.

91A-5-426. Enlargement or limitation of powers of conservator. Subject to the restrictions in section 91A-5-408(4), the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by sections 91A-5-424 and 91A-5-425, any power which the court itself could exercise under sections 91A-5-408(2) and 91A-5-408(3). The court may, at the time of appointment or later, limit the powers of a conservator conferred by the court, and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by section 91A-5-424 or section 91A-5-425, the limitation shall be endorsed upon his letters of appointment.

History: En. 91A-5-426 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales

and mortgages of land, only with special court authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the pro-

visions for protection of third parties have full effect. The Veterans Administration may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act [secs. 91-4801 et

seq., repealed effective July, 1975] and require the conservator to file annual accounts.

The court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the court itself might act.

91A-5-427. Preservation of estate plan. In investing the estate, and in selecting assets of the estate for distribution under subsections (1) and (2) of section 91A-5-425, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

History: En. 91A-5-427 by Sec. 1, Ch. 365, L. 1974.

91A-5-428. Claims against protected person—enforcement. (1) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods:

(a) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed;

(b) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator.

A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within sixty (60) days after its presentation. A claim is deemed presented on the first to occur of receipt of the written statement of claim by the conservator, or the filing of the claim with the court. The presentation of a claim tolls any statute of limitation relating to the claim until thirty (30) days after its disallowance.

(2) A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(3) If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance and education of the protected

person or his dependents and existing claims for expenses of administration.

History: En. 91A-5-428 by Sec. 1, Ch. 365, L. 1974.

91A-5-429. Individual liability of conservator. (1) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a conservator in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable therefor.

(4) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

History: En. 91A-5-429 by Sec. 1, Ch. 365, L. 1974.

91A-5-430. Termination of conservatorship. The protected person, his personal representative, the conservator or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected persons or his successors, to evidence the transfer.

History: En. 91A-5-430 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

The persons entitled to notice of a petition to terminate a conservatorship are identified by section [91A-5-405].

Any interested person may seek the termination of a conservatorship when there is some question as to whether the

trust is still needed. In some situations (e.g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservatorship.

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See [section 91A-5-421].

91A-5-431. Payment of debt and delivery of property to foreign conservator without local proceedings. Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary

appointed by a court of the state or residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

History: En. 91A-5-431 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

Section [91A-5-410(1)(a)] gives a foreign conservator or guardian of property, appointed by the state where the disabled

person resides, first priority for appointment as conservator in this state. A foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.

Part 5—Powers of Attorney

Section

91A-5-501. When power of attorney not affected by disability.

91A-5-502. Other powers of attorney not revoked until notice of death or disability.

91A-5-501. When power of attorney not affected by disability. Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend or terminate all or any part of the power of attorney or agency.

History: En. 91A-5-501 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section permits a person who is sui juris to execute a power of attorney which will become or remain effective in

the event he should later become disabled. If the court should subsequently appoint a conservator, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The section is based in part on Code of Va. (1950), Sec. 11-9.1.

91A-5-502. Other powers of attorney not revoked until notice of death or disability. (1) The death, disability, or incompetence of any principal

who has executed a power of attorney in writing other than a power as described by section 91A-5-501, does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(2) An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

History: En. 91A-5-502 by Sec. 1, Ch. 365, L. 1974.

Editorial Board Comment

This section adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney

in fact has actual knowledge of the death or disability. Provision is made for proving lack of knowledge by affidavit and the recordation of the affidavit to protect transactions that might otherwise be invalidated at common law. The section is based on Code of Va. (1950), Sec. 11-9-2.

CHAPTER 6

GENERAL PROVISIONS

Section

- 91A-6-101. Provisions for payment or transfer at death.
- 91A-6-102. Effective date.
- 91A-6-103. Terms include personal representative.
- 91A-6-104. Uniform Probate Code takes precedence.

91A-6-101. Provisions for payment or transfer at death. (1) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(a) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(b) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or

(c) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(2) Nothing in this section limits the rights of creditors under other laws of this state.

History: En. 91A-6-101 by Sec. 1, Ch. 365, L. 1974.

Compiler's Notes

The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners is designated as section 6-201.

Editorial Board Comment

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be canceled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these

problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing to eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with section [91A-2-502]; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

91A-6-102. Effective date. (1) This code takes effect on July 1, 1975.

(2) Except as provided elsewhere in this code, on the effective date of this code:

(a) the code applies to any wills of decedents dying thereafter;

(b) the code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code;

(c) every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(d) an act done before the effective date in any proceeding and any accrued right is not impaired by this code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(e) any rule of construction or presumption provided in this code applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.

History: En. 91A-6-102 by Sec. 3, Ch. 365, L. 1974.

91A-6-103. Terms include personal representative. Where in the codes of the state of Montana the terms "administrator," "administrator with the will annexed," "executor" or a combination of such terms are used, such terms shall be deemed to include, unless the context clearly requires to the contrary, the term "personal representative."

History: En. 91A-6-103 by Sec. 17, Ch. 365, L. 1974.

91A-6-104. Uniform Probate Code takes precedence. Should any provision of this act conflict with any provisions of other statutes of the state of Montana relating to probate, guardianship, or other subjects incorporated in this act, and such other statute or statutes was or were adopted prior to the enactment of this act, the provisions of this act shall be deemed to be controlling.

History: En. 91A-6-104 by Sec. 19, Ch. 365, L. 1974.

Separability Clause.

Section 20 of Ch. 365, Laws 1974 read: "If any provision of this act or the application thereof to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable."

Repealing Clause

Section 2 of Ch. 365, Laws 1974 read: "Sections 22-101 through 22-117, 91-101, 91-102, 91-107, 91-108, 91-113 through 91-116, 91-122, 91-125 through 91-130, 91-135 through 91-139, 91-141, 91-201, 91-210, 91-214 through 91-217, 91-227, 91-235, 91-301, 91-303, 91-304, 91-307, 91-308, 91-311 through 91-314, 91-317, 91-319, 91-321, 91-402 through 91-405, 91-411 through 91-418, 91-423 through 91-430, 91-520 through 91-522, 91-612A, 91-612B, 91-701, 91-702, 91-801 through 91-811, 91-901, 91-904, 91-1001 through 91-1003, 91-1101 through 91-1105, 91-1107, 91-1301 through 91-1303, 91-1305 through 91-1312, 91-1401, 91-1402, 91-1404

through 91-1406, 91-1501 through 91-1509, 91-1601 through 91-1604, 91-1701 through 91-1723, 91-1801 through 91-1807, 91-1901 through 91-1906, 91-2002 through 91-2004, 91-2101 through 91-2105, 91-2201 through 91-2204, 91-2207 through 91-2213, 91-2401 through 91-2407, 91-2501 through 91-2507, 91-2601 through 91-2612, 91-2701 through 91-2705, 91-2707 through 91-2712, 91-2715 through 91-2720, 91-2723, 91-2724, 91-2801 through 91-2810, 91-2901, 91-2902, 91-3001 through 91-3039, 91-3101 through 91-3109, 91-3201 through 91-3204, 91-3209 through 91-3212, 91-3301 through 91-3313, 91-3405, 91-3407, 91-3601 through 91-3608, 91-3701 through 91-3706, 91-3801 through 91-3803, 91-3901 through 91-3907, 91-4001 through 91-4012, 91-4101 through 91-4106, 91-4311, 91-4314 through 91-4316, 91-4321, 91-4322, 91-4501 through 91-4508, 91-4510 through 91-4518, 91-4522 through 91-4525, 91-4601 through 91-4604, 91-4606 through 91-4608, 91-4610, 91-4611, 91-4701 through 91-4706, 91-4801 through 91-4822, 91-4901 through 91-4904, 91-4906, 91-4907, 91-4909 through 91-4911, 91-5001 through 91-5007, 91-5101 through 91-5111, 91-5202, 91-5203, 91-5210, 91-5301 through 91-5312, and 93-1404.4, R. C. M. 1947, are repealed."

TITLE 91—WILLS, SUCCESSION, PROBATE AND GUARDIANSHIP

[Miscellaneous provisions as amended and enacted by Chapter 365, Laws of 1974, to become effective July 1, 1975.]

CHAPTER 1—WILLS—EXECUTION AND REVOCATION

91-131. (7004) Mortgage not a revocation of will. A charge or encumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed.

History: En. Sec. 462, p. 354, L. 1877; Sec. 4750, Rev. C. 1907; re-en. Sec. 7004, re-en. Sec. 462, 2nd Div. Rev. Stat. 1879; R. C. M. 1921; amd. Sec. 15, Ch. 365, L. re-en. Sec. 462, 2nd Div. Comp. Stat. 1974. Cal. Civ. C. Sec. 1302. Based on Field 1887; re-en. Sec. 1747, Civ. C. 1895; re-en. Civ. C. Sec. 570.

CHAPTER 2—WILLS—INTERPRETATION

91-218. (7033) “Heirs,” “relatives,” “issue,” “descendants,” etc. A testamentary disposition to “heirs,” “relations,” “nearest relations,” “representatives,” “legal representatives,” or “personal representatives,” or “family,” “issue,” “descendants,” “nearest,” or “next of kin,” of any person, without words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions relating to intestate succession in this code.

History: En. Sec. 491, p. 358, L. 1877; 4780, Rev. C. 1907; re-en. Sec. 7033, re-en. Sec. 491, 2nd Div. Rev. Stat. 1879; R. C. M. 1921; amd. Sec. 18, Ch. 365, L. re-en. Sec. 491, 2nd Div. Comp. Stat. 1887; 1974. Cal. Civ. C. Sec. 1334. Field Civ. C. re-en. Sec. 1787, Civ. C. 1895; re-en. Sec. Sec. 596.

CHAPTER 6—PROBATE PROCEEDINGS—PUBLIC ADMINISTRATOR

91-612. (10001) Moneys of estates in hands of public administrator, deposit and payment of—escheated estates fund. It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending, all moneys of the estate, and such moneys may be drawn upon the order of the personal representative, countersigned by a district judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the personal representative, when countersigned by a district judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safekeeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are liable upon his official bond. The moneys thus deposited may, upon order of the court or judge, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is for the best interests of the estate. At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge

shall make an order directing the administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall credit the same and all other moneys belonging to said estate to the escheated estates fund, and the county treasurer shall forthwith remit all of said money to the department of revenue with a statement as to the estates to which the money belongs, which remittance shall be treated as provided in chapter 5, Title 91, R. C. M. 1947, as amended.

History: En. Sec. 344, p. 329, L. 1877; R. C. M. 1921; amd. Sec. 1, Ch. 119, L. 1929; amd. Sec. 1, Ch. 76, L. 1931; amd. re-en. Sec. 344, 2nd Div. Rev. Stat. 1879; re-en. Sec. 344, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4521, Pol. C. 1895; re-en. Sec. 3084, Rev. C. 1907; re-en. Sec. 10001, Sec. 14, Ch. 365, L. 1974. Cal. C. Civ. Proc. Sec. 1737.

CHAPTER 11—PROBATE PROCEEDINGS—CONTESTING WILLS AFTER PROBATE

91-1106. (10047) Costs and expenses—by whom paid. When the validity or probate of a will is contested through court action the fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

History: En. Sec. 35, p. 248, L. 1877; Sec. 7412, Rev. C. 1907; re-en. Sec. 10047, re-en. Sec. 35, 2nd Div. Rev. Stat. 1879; R. C. M. 1921; amd. Sec. 16, Ch. 365, L. 1974. Cal. C. Civ. Proc. Sec. 1332. re-en. Sec. 35, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2365, C. Civ. Proc. 1895; re-en.

CHAPTER 34—LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS

91-3406. (10286) Claims for less than nominal value. If the personal representative pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

History: En. Sec. 252, p. 305, L. 1877; Sec. 7632, Rev. C. 1907; re-en. Sec. 10286, re-en. Sec. 252, 2nd Div. Rev. Stat. 1879; R. C. M. 1921; amd. Sec. 13, Ch. 365, L. 1974. Cal. C. Civ. Proc. Sec. 1617. re-en. Sec. 252, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2775, C. Civ. Proc. 1895; re-en.

CHAPTER 44—INHERITANCE TAX

91-4411. (10400.3a) Estate tax. (a) In addition to the inheritance taxes hereinabove imposed, an estate tax is hereby imposed upon the transfer of the estate of every decedent leaving an estate which is subject to the federal estate tax imposed by the United States of America under the applicable provisions of the Internal Revenue Code and which has, in whole or in part, a taxable situs in this state. The tax hereby imposed upon the transfer of each such estate shall be equal to the maximum tax credit allowable for state death taxes against the federal estate tax imposed with respect to the portion of the decedent's estate having a taxable situs in this state, less the inheritance taxes, if any, due this state, it being the purpose and intent of this section to impose only such additional taxes hereunder as may be necessary to give this state the full benefit of the maximum tax credit allowable against the federal estate tax imposed with respect to a decedent's estate which has a taxable situs in this state. If only a portion of a decedent's estate has a taxable situs in this state,

such maximum tax credit shall be determined by multiplying the entire amount of the credit allowable against the federal estate tax for state death taxes by the percentage which the value of the portion of the decedent's estate which has a taxable situs in this state bears to the value of the entire estate. The tax imposed herein shall be collected by the several county treasurers or the department of revenue for deposit with the state treasurer and distributed as hereafter provided. For the purpose of this tax, the taxable situs of property shall be the same as the taxable situs for inheritance tax purposes.

(b) When payable. The estate tax shall be payable to the county treasurer of the county in which such estate is being probated at the same time, or times, at which the United States tax is payable and shall bear interest, if any, at the same rate and for the same period as such United States tax.

(c) Liability. Administrators, executors, trustees and grantees under a conveyance, made during the grantor's life and taxable hereunder, shall be liable for such taxes with interest, until the same have been paid.

(d) Lien. Said taxes and interest shall be, and remain, a lien on the property for a period of ten (10) years from the date of death, unless sooner paid.

(e) Extension of time. The district court of the county in which such estate is being probated may, for cause shown, extend the time of payment of said tax whenever the circumstances of the case require.

(f) Duplicate returns. It shall be the duty of the personal representative of the estate of any decedent, whose estate may be subject to the payment of a United States estate tax, to file duplicates of the United States estate tax returns with the district court of the county in which such estate is being probated and with the department of revenue. He shall also file with such court and with the department a certificate or other evidence from the bureau of internal revenue showing the amount of the United States estate tax as computed by that department. The department of revenue shall enter an order determining such state estate tax and the amount thereof so due and payable. Any person in interest aggrieved by such determination shall have the same right to apply for district court determination and of rehearing and appeal as is now provided for in the determination of inheritance taxes.

(g) Intent of subdivisions (a) to (h). It is hereby declared to be the intent and purpose of subdivisions (a) to (h) to obtain for this state the benefit of the credit allowed under the provisions of said Internal Revenue Code, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose.

(h) Provisions applicable. The provisions of sections 91-4401 to 91-4456, inclusive, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by subdivisions (a) to (h), in so far as the same are applicable and not in conflict with the provisions hereof.

History: En. Sec. 2, Ch. 48, Ex. L. 1933; Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, 1974.

91-4417. (10400.7) Powers of representative in collection and payment of tax—collection from devisees. Every personal representative shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such personal representative, having in charge or in trust any property for distribution, subject to such tax, shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer, as herein provided. If such property be not in money, he shall collect the tax thereon upon the appraised value thereof, from the person entitled thereto. He shall not deliver or be compelled to deliver any specific property subject to tax under this law, to any person until he shall have collected the tax thereon. If any such devise shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the personal representative, and the tax shall remain a lien or charge on such real property for the period provided in section 91-4415, and the payment thereof shall be enforced by the personal representative, in the same manner that payment of the devise might be enforced, or by the attorney general under section 91-4440. If any such devise shall be given in money to any such person for a limited period, the personal representative shall retain the tax upon the whole amount, but if it be not in money, and agreement as to apportionment cannot be reached by him with the devisee or devisees affected, he shall make application to the appropriate court to make an apportionment if the case require it, of the sum to be paid into the hands of such devisees, and for such further order relative thereto as the case may require, such application being treated as a supervised proceeding.

History: En. Sec. 7, Ch. 65, L. 1923;
amd. Sec. 2, Ch. 99, L. 1965; amd. Sec. 5,
Ch. 365, L. 1974.

91-4423. (10400.13) Jurisdiction of district court. The district court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws, and to do any act in relation thereto authorized by law to be done by a district court in other matters or proceedings coming within its jurisdiction; and if two or more district courts shall be entitled to exercise any such jurisdiction, the district court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other district court.

History: En. Sec. 12, Ch. 65, L. 1923; Ch. 79, L. 1951; amd. Sec. 81, Ch. 391,
amd. Sec. 3, Ch. 150, L. 1925; amd. Sec. 1, L. 1973; amd. Sec. 6, Ch. 365, L. 1974.

91-4430. (10400.20) Notice of hearing. Notice of such hearing to determine the inheritance tax shall be given in the manner and for the time provided in section 91A-1-401 of this act, to all interested persons and to the department of revenue.

A copy of the application for exclusion of any property to avoid inheritance tax thereon shall be given with notice of hearing thereof, and notice of any such hearing shall be mailed to the state department of revenue not less than fifteen (15) days before such hearing, upon notice forms provided by the department and containing such information as it may require.

History: En. Sec. 15, Ch. 65, L. 1923; 1949; amd. Sec. 87, Ch. 391, L. 1973; amd. amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Sec. 7, Ch. 365, L. 1974.
Ch. 141, L. 1927; amd. Sec. 1, Ch. 80, L.

91-4437. (10400.27) Court order determining tax—contents. When the district court shall be required to make a determination of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be substantially in the form prescribed by the state department of revenue. A copy of the same shall be delivered or mailed to the county treasurer, the administrator or executor, and the state department of revenue, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed, and receipts are filed with such court showing the payment of all such taxes, or proof is filed showing that the bond authorized by section 91-4419 has been given.

History: En. Sec. 15, Ch. 65, L. 1923; L. 1971; amd. Sec. 89, Ch. 391, L. 1973; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, amd. Sec. 8, Ch. 365, L. 1974.
Ch. 141, L. 1927; amd. Sec. 1, Ch. 161,

91-4438. (10400.28) Rehearing within sixty days. When an appraisalment, assessment, or determination of tax is made by a district court the attorney general, state department of revenue, public administrator, county attorney, or any person dissatisfied with the appraisalment or assessment and determination of such tax may apply for a rehearing thereof before the district court within sixty (60) days from the fixing, assessing and determination of the tax by the district court as herein provided on filing a written notice which shall state the grounds of the application for a rehearing. The rehearing shall be upon the records, proceedings, and proofs had and taken on the hearing as herein provided unless additional or newly discovered evidence be alleged therefor, and a new trial shall not be had or granted unless specially ordered by the district court.

History: En. Sec. 15, Ch. 65, L. 1923; Ch. 141, L. 1927; amd. Sec. 90, Ch. 391, amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, L. 1973; amd. Sec. 9, Ch. 365, L. 1974.

91-4448. (10400.38) Forms and blanks. The state department of revenue shall prescribe such forms and prepare such blanks as may be necessary in inheritance tax proceedings; and such blanks shall be printed at

the expense of the state and furnished to each district court or the clerk thereof upon the request of the judge or clerk thereof.

History: En. Sec. 18, Ch. 65, L. 1923; 99, Ch. 391, L. 1973; amd. Sec. 10, Ch. 365, amd. Sec. 6, Ch. 150, L. 1925; amd. Sec. L. 1974.

91-4467. Purpose of act—limitation on application. The purpose of this act is to provide a simplified procedure of removing the inheritance tax lien which attaches upon the death of a grantor where the transfer is from husband to wife, or wife to husband, and where the total value of the real property so transferred does not exceed the value of twenty-five thousand dollars (\$25,000), at the time of death; provided, however, this act shall not apply to other transfers of property under the Inheritance Tax Act.

History: En. Sec. 8, Ch. 248, L. 1961;
amd. Sec. 11, Ch. 365, L. 1974.

91-4468. Personal representative to furnish information—department to determine tax—appeal. The personal representative, or should the personal representative fail to do so, any interested person, shall make application to the state department of revenue for determination of any tax due upon the estate of a decedent. The applicant shall furnish to the department of revenue the inventory and appraisement required by section 91A-3-706 of this act and of any supplemental inventory under section 91A-3-707 of this act together with a statement, under oath or affirmation, of any property owned by the decedent at the time of his death situated outside of this state and without its jurisdiction, and, further, shall furnish the department with the final accounting of such personal representative as provided by section 91A-3-714 of this act. If the decedent died testate, the personal representative shall likewise furnish the department with a certified copy of the last will of the decedent. If the decedent died intestate, the personal representative shall provide the department with a sworn statement setting forth the names, ages, and residences of the heirs at law of decedent. In all cases, the personal representative shall set forth the proportion of the entire estate inherited by or devised to each of said persons, and the relation, if any, which each devisee, heir, or transferee sustained to the decedent or person from whom the transfer was made. The information so provided shall not be binding upon the department in case it believes the same to be erroneous or untrue. From the information so furnished the department and such other information as it may be able to obtain with reference thereto, the department shall, with reasonable diligence, proceed to ascertain and determine the amount of tax, if any, due under the provisions of the inheritance tax laws of the state of Montana, and a copy of such determination shall be mailed to the personal representative and to the clerk of the appropriate district court. If no tax is due, the department shall likewise so inform the clerk of district court and the personal representative. Upon receipt of notice from the department of the amount of tax due or that no tax is due, the personal representative shall notify all persons having a beneficial interest in said estate as promptly as may be. Should the personal representative or any person affected by the determination of inheritance tax feel aggrieved by

the department's determination, he may, within sixty (60) days after the filing of the copy of such determination with the clerk of district court, appeal the determination to the appropriate district court, by serving upon the department his objections to such determination and by filing such notice, after so serving the same, in the office of the clerk of such court. The court shall set a day for hearing such appeal upon ten (10) days' notice to all interested parties, and at the time and place set shall hear the appeal, upon all papers and records which may be properly presented before it, and shall as soon as possible thereafter issue its order determining the amount of such inheritance tax, if it finds a tax to be due

History: En. 91-4468 by Sec. 4, Ch.
365, L. 1974.

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FOR
THE UNIFORM PROBATE CODE**

Adapted from the Index prepared by the Joint Editorial Board for the
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3001. Montana Rules of Appellate Civil Procedure, Rules 1 to 43, Appendix of Forms, Tables A to C.

CHAPTER 1—COURTS OF JUSTICE, OF RECORD AND OF IMPEACHMENT

Section 93-104. Jurisdiction.

93-104. (8787) Jurisdiction. The court has jurisdiction to try impeachments, when presented by the house of representatives, of the governor, executive officers, heads of state departments and judicial officers for felonies and misdemeanors or malfeasance in office.

History: En. Sec. 7, C. Civ. Proc. 1895; re-en. Sec. 6241, Rev. C. 1907; re-en. Sec. 8787, R. C. M. 1921; amd. Sec. 1, Ch. 5, L. 1973. Cal. C. Civ. Proc. Sec. 37.

Amendments

The 1973 amendment substituted "executive officers, heads of state departments" for a reference to other state officers; deleted "except justices of the peace" following "judicial officers"; and substituted "felonies" for "high crimes."

CHAPTER 2—SUPREME COURT

Section 93-201. Justices—number increased to five—election and term of office.

93-201. (8790) Justices—number increased to five—election and term of office. The supreme court consists of a chief justice and four associate justices, who are elected by the qualified electors of the state at large at the general state elections next preceding the expiration of the terms of office of their predecessors, respectively, and hold their offices for the term of eight (8) years from and after the first Monday of January next succeeding their election.

History: En. Sec. 12, C. Civ. Proc. 1895; re-en. Sec. 6244, Rev. C. 1907; amd. Sec. 1, Ch. 31, Ex. L. 1919; re-en. Sec. 8790, R. C. M. 1921; amd. Sec. 1, Ch. 13, L. 1973. Cal. C. Civ. Proc. Sec. 40.

Amendments

The 1973 amendment increased the term

of office from six to eight years; and made minor changes in phraseology.

Repealing Clause

Section 2 of Ch. 13, Laws 1973 read "Sections 93-202, 93-203, 93-204, 93-205, 93-206, R. C. M. 1947, are repealed."

93-202 to 93-206. (8791 to 8795) Repealed.**Repeal**

Sections 93-202 to 93-206 (Secs. 2 to 6, Ch. 31, Ex. L. 1931), relating to appointments of additional justices to increase

the supreme court from three to five justices, were repealed by Sec. 2, Ch. 13, Laws 1973.

93-209. (8798) Repealed.**Repeal**

Section 93-209 (Sec. 14, C. Civ. Proc. 1895), relating to filling of vacancies in

office of supreme court justice, was repealed by Sec. 14, Ch. 470, Laws 1973. For new law, see secs. 93-705 to 93-717.

93-214. (8803) Original jurisdiction.**Declaratory Judgment**

Determination of legal rights concerning election of delegates and implementation of state constitutional convention was properly decided in declaratory judg-

ment action by supreme court under its original jurisdiction in aid of its appellate jurisdiction. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P 2d 330.

93-216. (8805) Powers and duties of supreme court on appeals.**Equity Case**

In an equity case it is proper for the appellate court to pry into the factual issues of the case and the decision must hinge on factual observations unless the case is returned to the lower court for further proceedings. *Jenson v. Olson*, 144 M 224, 395 P 2d 465, 468.

The supreme court in reviewing an equity case will review the law therein and also will review the evidence to that extent necessary to ascertain whether the findings of fact by the trial court are substantially supported and sufficient to support the conclusions of law derived therefrom. *Bender v. Bender*, 144 M 470, 397 P 2d 957.

Supreme court in equity case not only has function of reviewing law involved but also reviews evidence to extent of determining whether findings of fact by trial court are supported by substantial evidence. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

Nuisance Cases

Supreme court will not hesitate to set aside lower court finding that nuisance exists where there is no substantial evidence on which to base finding. *Kasala v. Kalispell Pee Wee Baseball League*, 151 M 109, 439 P 2d 65, 32 ALR 3d 1120.

Probate Proceedings

Supreme court reversed where evidence did not support district court finding that will was drafted at direction of decedent and that he was aware of its contents when he signed. *Erickson v. Erickson*, 152 M 179, 448 P 2d 144.

93-220. Repealed.**Repeal**

Section 93-220 (Sec. 2, Ch. 139, L. 1957), relating to filling vacancy on su-

Remand to District Court

Trial court abused discretion in dismissing action for failure of plaintiff to prosecute case returned by supreme court to lower court for new trial where trial court failed to set trial for next jury term as per order of supreme court under statute providing that supreme court may direct new trial. *Jangula v. United States Rubber Co.*, 149 M 241, 425 P 2d 319.

Scope of Review

Function of supreme court on review is to determine whether there is substantial evidence to support findings of fact and conclusions of law. *Peery v. Higgins*, 152 M 140, 447 P 2d 481.

Review of evidence is limited to determining whether there is substantial evidence to support trial court's findings of fact and whether such findings are sufficient to support conclusions of law. *Keller v. Martin*, 153 M 9, 452 P 2d 422.

Specific Performance

Where district court decree ordering conveyance of property contained directions as to distribution of the sale price that could be construed as at variance from its findings as to ownership, supreme court could modify decree so as to distribute money in accordance with the findings. *Morris v. Monk*, 158 M 163, 499 P 2d 1029.

References

Kyser v. Hiebert, 142 M 466, 385 P 2d 90; *State ex rel. Keast v. Krieg*, 147 M 164, 410 P 2d 710.

preme court, was repealed by Sec. 14, Ch. 470, Laws 1973. For new law, see secs. 93-705 to 93-717.

CHAPTER 3—DISTRICT COURTS

- Section 93-301. Judicial districts defined.
 93-302. Number of judges.
 93-303. Salaries of district judges.
 93-313. Expenses of judges holding court in other counties.
 93-318. Original jurisdiction.

93-301. (8812) Judicial districts defined. In this state there are eighteen judicial districts, distributed as follows:

- First district: Lewis and Clark and Broadwater counties.
 Second district: Silver Bow county.
 Third district: Deer Lodge, Granite, and Powell counties.

Fourth district: Missoula, Mineral, Lake, Ravalli, and Sanders counties.

Fifth district: Beaverhead, Jefferson, and Madison counties.

Sixth district: Park and Sweet Grass counties.

Seventh district: Dawson, McCone, Richland, and Wibaux counties.

Eighth district: Cascade and Chouteau counties.

Ninth district: Teton, Pondera, Toole, and Glacier counties.

Tenth district: Fergus, Judith Basin, and Petroleum counties.

Eleventh district: Flathead and Lincoln counties.

Twelfth district: Liberty, Hill, and Blaine counties.

Thirteenth district: Yellowstone, Big Horn, Carbon, Stillwater, and Treasure counties.

Fourteenth district: Meagher, Wheatland, Golden Valley, and Musselshell counties.

Fifteenth district: Roosevelt, Daniels, and Sheridan counties.

Sixteenth district: Custer, Carter, Fallon, Prairie, Powder River, Garfield, and Rosebud counties.

Seventeenth district: Phillips and Valley counties.

Eighteenth district: Gallatin county.

History: En. Sec. 6256, Rev. C. 1907; re-en. Sec. 8812, R. C. M. 1921; amd. Sec. 1, Ch. 91, L. 1929; amd. Sec. 1, Ch. 23, L. 1973.

Amendments

The 1973 amendment increased the number of districts from seventeen to

eighteen and transferred Gallatin county from the sixth to the eighteenth district.

Repealing Clause

Section 2 of Ch. 23, Laws 1973 read "Sections 93-301.1, 93-301.2, 93-301.3, and 93-301.4, R. C. M. 1947, are repealed."

93-301.1 to 93-301.4. Repealed.

Repeal

Sections 93-301.1 to 93-301.4 (Secs. 1 to 4, Ch. 80, L. 1947), creating the

eighteenth judicial district, were repealed by Sec. 2, Ch. 23, Laws 1973. For present law, see sec. 93-301.

93-302. (8813) **Number of judges.** In each judicial district there must be the following number of judges of the district court, who must be elected by the qualified voters of the district, and whose term of office must be six (6) years, to wit: In the first, second, eleventh and sixteenth, two judges each, in the thirteenth, eighth and fourth, three judges, and, in all other districts, one judge each.

History: En. Sec. 1, p. 156, L. 1901; re-en. Sec. 6264, Rev. C. 1907; re-en. Sec. 8813, R. C. M. 1921; amd. Sec. 2, Ch. 91, L. 1929; amd. Sec. 1, Ch. 18, L. 1955; amd. Sec. 1, Ch. 91, L. 1957; amd. Sec. 1, Ch. 161, L. 1959; amd. Sec. 1, Ch. 229, L. 1963; amd. Sec. 1, Ch. 14, L. 1973.

Amendments

The 1973 amendment increased the term of office from four to six years; and deleted a second paragraph relating to the appointment of a judge of the fourth district to serve until the 1964 election.

93-303. (8814) **Salaries of district judges.** The annual salary of each district judge shall be twenty-five thousand dollars (\$25,000).

History: En. Sec. 1, Ch. 176, L. 1919; re-en. Sec. 8814, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1947; amd. Sec. 1, Ch. 84, L. 1951; amd. Sec. 1, Ch. 247, L. 1955; amd. Sec. 1, Ch. 198, L. 1959; amd.

Sec. 1, Ch. 187, L. 1961; amd. Sec. 2, Ch. 212, L. 1963; amd. Sec. 2, Ch. 308, L. 1967; amd. Sec. 1, Ch. 322, L. 1969; amd. Sec. 1, Ch. 4, 2nd Ex. L. 1971; amd. Sec. 2, Ch. 377, L. 1974.

Amendments

The 1967 amendment increased from \$14,000 to \$15,000 the annual salary for district judges.

The 1969 amendment increased the annual salary from \$15,000 to \$19,000.

The 1971 amendment increased the annual salary from \$19,000 to \$20,500, effective July 1, 1971.

The 1974 amendment increased the annual salary from \$20,500 to \$25,000, effective July 1, 1974.

Repealing Clause

Section 3 of Ch. 308, Laws 1967 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3 of Ch. 377, Laws 1974 read "This act is effective July 1, 1974."

93-309. (8820) Repealed.**Repeal**

Section 93-309 (Sec. 35, C. Civ. Proc. 1895), relating to vacancies on the district

court bench, was repealed by Sec. 14, Ch. 470, Laws 1973. For new law, see secs. 93-705 to 93-717.

93-313. (8824) Expenses of judges holding court in other counties. Each district judge of a judicial district in this state, composed of more than one county, when, for the purpose of holding court and disposing of judicial business, he goes to a county of his judicial district, other than the county in which he resides, and therein holds court or transacts judicial business, shall be paid all of his actual and necessary expenses of transportation and living, incurred on account thereof, and all expenditures made therefor, from the time he leaves his place of residence until he returns thereto. Actual and necessary expenses of transportation incurred when a judge uses his own automobile shall be calculated at the rate of twelve cents (\$.12) per mile.

History: En. Sec. 1, Ch. 91, L. 1911; re-en. Sec. 8824, R. C. M. 1921; amd. Sec. 2, Ch. 455, L. 1973.

Amendments

The 1973 amendment added the second sentence.

93-318. (8829) Original jurisdiction. (1) The district court has original jurisdiction in:

- (a) all criminal cases amounting to felony,
- (b) all civil and probate matters,
- (c) all cases at law and in equity,
- (d) all cases of misdemeanor not otherwise provided for, and
- (e) all such special actions and proceedings as are not otherwise provided for.

(2) The district court has the power of naturalization, and to issue papers therefor, in all cases where they are authorized to do so by the laws of the United States.

(3) The district court and its judges have power to issue, hear, and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction, and other original remedial writs, and all writs of habeas corpus, on petition by, or on behalf of any person held in actual custody in their respective districts. Injunctions, writs of prohibition, and habeas corpus may be issued and served on legal holidays and nonjudicial days.

History: En. Sec. 41, C. Civ. Proc. 1895; re-en. Sec. 6275, Rev. C. 1907; re-en. Sec. 8829, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1973. Cal. C. Civ. Proc. Sec. 76.

Amendments

The 1973 amendment divided the section into numbered subdivisions; rewrote subdivision (1) to conform to the new constitution; and made minor changes in style.

93-320. (8831) Process.

References

Beavers v. Rankin, 142 M 570, 385 P 2d 640.

CHAPTER 4—JUSTICES' AND POLICE COURTS

- Section 93-401. Justices' courts and justices of the peace.
93-402. Courts—when open for business.
93-403. Holding court for another justice within county.
93-405. Terms of office.
93-412. Facilities furnished to justices by county.
93-413. Salaries of justices of the peace.
93-414. Office hours of justices.

93-401. (8833) Justices' courts and justices of the peace. (1) There must be at least one (1) justice court in each county of the state. The board of county commissioners of each county of the state shall have authority to constitute one (1) additional justice court in their respective counties as the board deems necessary. One (1) justice court in each county must be located at the county seat and the board of county commissioners shall determine the location of the other justice court in their respective counties. Each justice of the peace must be elected by the qualified electors of the county at the general state election next preceding the expiration of the term of office of his predecessor.

(2) A justice of the peace shall be nominated and elected on the nonpartisan judicial ballot in the same manner as are judges of the district court. Each judicial office shall be a separate and independent office for election purposes and each office shall be numbered by the county commissioners and each candidate for justice of the peace shall specify the number of the office for which he seeks to be elected. A candidate may not file for more than one (1) office. Section 23-4511 prohibiting political party endorsement for judicial officers shall also apply to justices of the peace.

(3) Each justice of the peace, elected or appointed, after he has received his certificate of election or appointment, shall, before entering upon the duties of his office take the constitutional oath of office, which must be filed with the county clerk.

(4) Before the county clerk may file the oath the elected or appointed justice must satisfy the clerk that he is either:

(a) an attorney at law authorized to practice law in the state of Montana, or

(b) a person who has held the office of justice of the peace within the preceding five (5) years, or

(c) a person who has completed the orientation course of study held under the direction of the university of Montana law school; or if a person is appointed after the course is offered he must agree to take the course at the next offering and failure to do so will disqualify him.

(5) The university of Montana law school shall present a course of study as soon as is practical following each general election. Mileage and per diem shall be paid the elected or appointed justice of the peace for

attending the course and shall be a proper charge against the county wherein the justice of the peace will hold court.

History: En. Sec. 60, C. Civ. Proc. 1895; re-en. Sec. 6279, Rev. C. 1907; re-en. Sec. 8833, R. C. M. 1921; amd. Sec. 4, Ch. 491, L. 1973; amd. Sec. 1, Ch. 23, L. 1974; amd. Sec. 1, Ch. 276, L. 1974. Cal. C. Civ. Proc. Sec. 85.

Compiler's Notes

This section was amended twice in 1974, once by Ch. 23 and once by Ch. 276. Neither amendatory act mentioned or incorporated the changes made by the other. Since the amendments do not appear to conflict, the compiler has made a composite section embodying the changes made by both amendments.

Amendments

The 1973 amendment designated the language in the former section as subsection (1); reduced the number of justice

courts from two per township to one per county; reduced the number of justices to be elected from two per township to one per county; and added subsections (2) through (5).

Chapter 23, Laws of 1974, substituted "university of Montana law school" in subsection (4)(c) for "Montana Magistrates Association of the state of Montana"; substituted "university of Montana law school" in subsection (5) for "Montana Magistrates Association"; and substituted "as soon as is practical" near the beginning of subsection (5) for "within four (4) weeks."

Chapter 276, Laws of 1974, inserted the provisions in subsection (1) authorizing the board of county commissioners in every county to constitute one additional justice court and directing the location of the justice courts.

93-402. (8834) Courts—when open for business. A justice's court is always open for the transaction of business, except on legal holidays and nonjudicial days.

History: En. Sec. 61, C. Civ. Proc. 1895; re-en. Sec. 6280, Rev. C. 1907; re-en. Sec. 8834, R. C. M. 1921; amd. Sec. 1, Ch. 92, L. 1933; amd. Sec. 6, Ch. 491, L. 1973; amd. Sec. 3, Ch. 276, L. 1974. Cal. C. Civ. Proc. Sec. 104.

Amendments

The 1973 amendment substituted "county" for "township"; and deleted "provided, that said justice may hold court beyond the limits of his township as provided in section 93-403" from the end of the section.

The 1974 amendment deleted "where held" following "Courts" in the caption and deleted "may be held at any place selected by the justice holding the same, in the county for which he is elected or appointed; and such court" following "A justice's court."

Effective Date

Section 4 of Ch. 276, Laws 1974 provided the act should be in effect from and after its passage and approval. Approved March 25, 1974.

93-403. (8835) Holding court for another justice within county. A justice of the peace of any county may hold the court of any other justice of the peace of the same county at his request, and while so acting is vested with the power of the justice for whom he so holds court, in which case the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice for whom he so holds the court.

History: En. Sec. 62, C. Civ. Proc. 1895; re-en. Sec. 6281, Rev. C. 1907; re-en. Sec. 8835, R. C. M. 1921; amd. Sec. 2, Ch. 92, L. 1933; amd. Sec. 7, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 105.

Amendments

The 1973 amendment substituted "county" for "township"; and deleted from the end of the section a proviso and two sentences which allowed the justice to hold court beyond the limits of his township.

93-405. (8837) Terms of office. The term of office of justices of peace is four (4) years from the first Monday in January next succeeding their election.

History: En. Sec. 64, C. Civ. Proc. 1895; re-en. Sec. 6283, Rev. C. 1907; re-en. Sec. 8837, R. C. M. 1921; amd. Sec. 8, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 110.

Amendments

The 1973 amendment increased the term of office from two to four years.

93-407. (8839) Repealed.

Repeal

This section (Sec. 1, p. 99, L. 1901; Sec. 1, Ch. 35, L. 1921), relating to the oath and bond of the justice of the peace, was

repealed by Sec. 10, Ch. 68, Laws 1967. For new provisions relating to bonds of county officers and employees, see sec. 6-203 et seq.

93-410. (8842) Criminal jurisdiction.

Driving While under Influence of Intoxicating Liquor

Since the offense of driving a vehicle on a highway while under the influence of intoxicating liquor in violation of sec-

tion 32-2142 is a misdemeanor, it falls within the jurisdiction of a justice of the peace under this section. *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

93-412. Facilities furnished to justices by county. (1) The board of county commissioners of the county in which the justice of the peace has been elected or appointed shall provide for the justices of the peace:

(a) the office, courtroom and clerical assistance necessary to enable him to perform his duties in dignified surroundings;

(b) the books, records, forms, papers, stationery, postage, office equipment and supplies necessary in the proper keeping of the records and files of the judicial office and the transaction of the business;

(c) the latest edition of the Revised Codes of Montana and all official supplements thereto.

(2) All actual and necessary expenses incurred by the justice of the peace in the performance of his official duties is a legal charge against the county.

History: En. Eec. 3, Ch. 491, L. 1973.

Title of Act

An act providing for the minimum number of justices of the peace, their compensation, qualifications, terms of office, training and designation as county officers; providing for the collection of fees by justices and improvement of their facilities; abolishing fees in criminal actions; and deleting references to town-

ships; all to comply with article VII, sections 5 and 7 of the 1972 Montana constitution; amending sections 11-727, 16-2403, 16-2404, 16-2406, 25-307, 93-401 through 93-403, 93-405, 93-704, 93-1602, 93-6601, 93-6602, 93-6706, 93-6903, 93-7302, 93-7311, 93-7402, 93-7605, 93-7607, 93-7704, 93-7709, 93-9705, R. C. M. 1947; and repealing sections 25-303, 25-305 and 25-306, R. C. M. 1947.

93-413. Salaries of justices of the peace. The board of county commissioners shall set salaries for justices of the peace by resolution, provided that:

(1) if the salary of the justice of the peace was determined on a fee basis for the years 1971 and 1972, he shall receive a monthly salary of not less than one-eighteenth of the total fees, civil and criminal, collected by the justice or his predecessor in office during the two (2) years, 1971 and 1972;

(2) if the salary of the justice of the peace was determined on a nonfee basis for the years 1971 and 1972, the justice shall be paid not

less than the highest salary earned by the justice or his predecessor for the years 1971 and 1972.

History: En. Sec. 1, Ch. 491, L. 1973.

93-414. Office hours of justices. In the resolution providing for the salary the county commissioners shall designate the office hours for each justice. Office hours shall be commensurate with the salary provided.

History: En. Sec. 2, Ch. 491, L. 1973.

CHAPTER 5—GENERAL PROVISIONS RESPECTING THE POWERS, PROCEEDINGS AND HOLDING OF COURTS OF JUSTICE

93-502. (8845) Courts of record may make rules.

Force of Rules

Trial court rule requiring filing of briefs in support of preliminary motions is proper exercise of authority under this

section and may be enforced by summary denial of motion where brief has not been filed. Hansen v. Kiernan, 159 M 448, 499 P 2d 787.

CHAPTER 7—QUALIFICATIONS, APPOINTMENT AND DISCIPLINE OF JUDICIAL OFFICERS

Section 93-702. Qualifications.

- 93-704. Residence and qualifications of justices of the peace.
- 93-705. Judicial nomination commission—creation—composition.
- 93-706. Terms of commission members—vacancy.
- 93-707. Secretary of commission.
- 93-708. Quorum.
- 93-709. Investigation of candidates—application for candidacy.
- 93-710. Submission of list to governor to fill vacancy.
- 93-711. Appointment by governor from list submitted.
- 93-712. Governor's failure to nominate.
- 93-713. Confirmation by senate—interim appointment.
- 93-714. Term of appointment—election for unexpired term.
- 93-715. Members of commission ineligible for judicial office.
- 93-716. No compensation—expenses.
- 93-717. Rules of commission.
- 93-718. Judicial standards commission—composition.
- 93-719. Terms of office of commission members.
- 93-720. Termination of membership—vacancy.
- 93-721. No compensation—expenses.
- 93-722. Investigation of judicial officers—complaint—hearing—disciplinary action.
- 93-723. Proceedings confidential—rules.
- 93-724. Determination and order by supreme court.
- 93-725. Judicial officer not to participate in investigation of self or relative.
- 93-726. Disqualification of judge pending criminal prosecution or proceeding before commission.
- 93-727. Suspension on conviction of crime—final disposition.
- 93-728. Order for retirement—removal.

93-701. (8862) Repealed.

Repeal

Section 93-701 (Sec. 160, C. Civ. Proc. 1895), relating to qualifications of justices

of the supreme court, was repealed by Sec. 2, Ch. 15, Laws 1973. For new law, see sec. 93-702.

93-702. (8863) Qualifications. No person is eligible for the office of justice of the supreme court or judge of the district court unless he is a citizen of the United States, who has resided in the state two (2) years immediately before taking office, and has been admitted to practice

law in Montana for at least five (5) years prior to the date of appointment or election. A judge of the district court need not be a resident of the district for which he is elected or appointed at the time of his election or appointment, but after his election or appointment, he shall reside in the district for which he is elected or appointed during his term of office. Justices of the supreme court shall reside within the state.

History: En. Sec. 161, C. Civ. Proc. 1895; re-en. Sec. 6309, Rev. C. 1907; re-en. Sec. 8863, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1973. Cal. C. Civ. Proc. Sec. 157.

Amendments

The 1973 amendment combined sections 93-701 and 93-702; eliminated age requirements for justices of the supreme court and district judges; increased the state residency requirement for district

judges from one year to two years; added the requirement of five years' admission to practice for both supreme court justices and district court judges; applied the qualifications to appointments as well as elections; and added the last sentence.

Repealing Clause

Section 2 of Ch. 15, Laws 1973 read "Section 93-701, R. C. M. 1947, is repealed."

93-704. (8865) Residence and qualifications of justices of the peace. Every justice of the peace must reside in the county in which his court is held, and no person is eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the county, in which he is to serve, for one year next preceding his election or appointment.

History: En. Sec. 163, C. Civ. Proc. 1895; re-en. Sec. 6311, Rev. C. 1907; re-en. Sec. 8865, R. C. M. 1921; amd. Sec. 13, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 159.

Amendments

The 1973 amendment substituted "county" for "township" near the beginning of the section.

93-705. Judicial nomination commission — creation — composition. There is created a judicial nomination commission for the state of Montana, whose function it shall be to provide the governor with a list of candidates for nominee to fill any vacancy on the supreme court or any district court of the state of Montana. The commission shall be composed of seven (7) members as follows:

(1) four (4) lay members, who are neither judges or attorneys, active or retired, and who shall reside in different geographical areas of the state; each of these four (4) members shall be representative of a different industry, business or profession, whether or not actively so engaged or retired; such members shall be appointed by the governor;

(2) two (2) attorneys, actively engaged in the practice of law, one (1) from each congressional district, who shall be appointed by the supreme court;

(3) one (1) district judge elected by the district judges under an elective procedure initiated and conducted by the supreme court and certified to such election by the chief justice of the supreme court, and which for the purpose of the language of this act shall be considered as an appointment.

History: En. Sec. 1, Ch. 470, L. 1973.

Title of Act

An act providing for the filling of vacancies in the office of district court judge

and supreme court justice to comply with article VII, section 8 of the 1972 Montana constitution; repealing sections 93-209, 93-220, 93-309, R. C. M. 1947.

93-706. Terms of commission members—vacancy. (1) All original members named to the commission shall all serve until January 1, 1976. Their successors shall serve as follows:

(a) the members appointed by the governor shall serve for four (4) year terms;

(b) the attorneys elected shall serve a two (2) year term;

(c) the judge elected shall serve a two (2) year term.

(2) Thereafter all members shall serve terms of four (4) years.

(3) In the event a vacancy on the commission occurs, the governor shall appoint a replacement for the remainder of the term, provided such replacement shall be a member of the same group as the member he replaces.

(4) Appointments provided for in this section shall be made within thirty (30) days of the completion of the preceding terms, or within thirty (30) days of the occurrence of any vacancy.

History: En. Sec. 2, Ch. 470, L. 1973.

93-707. Secretary of commission. The commission shall elect one (1) of its members to serve as the secretary, and upon such election shall notify the governor of the name and mailing address of such person; the secretary shall keep a record of all proceedings by the commission, and act as corresponding secretary with the governor's office.

History: En. Sec. 3, Ch. 470, L. 1973.

93-708. Quorum. Four (4) members of the commission shall constitute a quorum for the transaction of business. To submit a name to the governor, there must be a concurrence of at least four (4) members.

History: En. Sec. 4, Ch. 470, L. 1973.

93-709. Investigation of candidates—application for candidacy. The commission and each member is authorized to make investigations concerning the qualifications of eligible persons, and any lawyer in good standing who has the qualifications set forth by law for holding judicial office, may be a candidate, and may make application to the commission for consideration, or application may be made by any person on his behalf.

History: En. Sec. 5, Ch. 470, L. 1973.

93-710. Submission of list to governor to fill vacancy. The commission shall meet forthwith after a vacancy occurs on the supreme court or district court and submit to the governor within thirty (30) days from the date of the vacancy a list of not less than three (3), nor more than five (5) persons.

History: En. Sec. 6, Ch. 470, L. 1973.

93-711. Appointment by governor from list submitted. The governor must make an appointment from those names submitted by the commission.

History: En. Sec. 7, Ch. 470, L. 1973.

93-712. Governor's failure to nominate. If the governor fails to nominate within thirty (30) days after receipt of the list, the chief justice or acting chief justice shall make the nomination.

History: En. Sec. 8, Ch. 470, L. 1973.

93-713. Confirmation by senate—interim appointment. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session is effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.

History: En. Sec. 9, Ch. 470, L. 1973.

93-714. Term of appointment—election for unexpired term. A nominee confirmed by the senate serves until the next succeeding general election. The candidate elected at that election holds the office for the remainder of the unexpired term.

History: En. Sec. 10, Ch. 470, L. 1973.

93-715. Members of commission ineligible for judicial office. Members of the commission are not eligible for nomination to a judicial office during their term on the commission or for one (1) year thereafter.

History: En. Sec. 11, Ch. 470, L. 1973.

93-716. No compensation—expenses. The members of the commission are not entitled to compensation for their services, but they are entitled to actual expenses while actually engaged in the discharge of their official duties.

History: En. Sec. 12, Ch. 470, L. 1973.

93-717. Rules of commission. The commission shall make rules for the conduct of its affairs and to provide for the confidentiality of its proceedings.

History: En. Sec. 13, Ch. 470, L. 1973.

Repealing Clause

Section 14 of Ch. 470, Laws 1973 read "Sections 93-209, 93-220, and 93-309, R. C. M. 1947, are repealed."

93-718. Judicial standards commission — composition. There is created a judicial standards commission consisting of five (5) members as follows:

(1) two (2) district court judges, from different judicial districts, elected by the district judges under an elective procedure initiated by and conducted by the supreme court and the two (2) so elected certified as to such election by the chief justice of the supreme court which for the purpose of the language of this act shall be considered as an appointment.

(2) one (1) attorney who has practiced law in this state for at least ten (10) years, appointed by the supreme court.

(3) two (2) citizens from different congressional districts who are not attorneys or judges of any court, active or retired, appointed by the governor.

History: En. Sec. 1, Ch. 95, L. 1973.

Title of Act

An act creating a judicial standards

commission and specifying the composition and the qualifications of the members in compliance with article VII, section 11 of the 1972 Montana constitution.

93-719. Terms of office of commission members. (1) The first appointments made under this act are as follows:

(a) the supreme court shall designate by certificate of the chief justice one (1) district court judge to serve for four (4) years, and one (1) to serve for two (2) years;

(b) the attorney shall serve for four (4) years; and

(c) the governor shall appoint one (1) citizen to serve for four (4) years, and one (1) to serve for two (2) years.

(2) Thereafter, all terms shall be for four (4) years.

History: En. Sec. 2, Ch. 95, L. 1973.

93-720. Termination of membership—vacancy. (1) Commission membership terminates if a member ceases to hold the position that qualified him for appointment.

(2) In the event a vacancy occurs on the commission, the appointing authority of the vacated seat shall designate a successor.

History: En. Sec. 3, Ch. 95, L. 1973.

93-721. No compensation—expenses. A commission member is not entitled to compensation for his services but is entitled to actual expenses incurred in the performance of his duties.

History: En. Sec. 4, Ch. 95, L. 1973.

93-722. Investigation of judicial officers—complaint—hearing—disciplinary action. (1) The commission, or any citizen of the state may upon good cause shown, initiate an investigation of any judicial officer in the state by filing a verified written complaint with the commission.

(2) The commission, after such investigation as it considers necessary and upon the finding of good cause, may:

(a) order a hearing to be held before it concerning the censure, suspension, removal or retirement of a judicial officer; or

(b) request the supreme court to appoint one (1) or more special masters, who are judges of courts of record, to hear and take evidence and to report to the commission.

(3) If after hearing or after considering the record and report of the masters, the commission finds the charges true, it shall recommend to the supreme court the censure, suspension, removal or retirement of the judicial officer.

History: En. Sec. 5, Ch. 95, L. 1973.

93-723. Proceedings confidential—rules. (1) All papers filed with, and proceedings before the commission or masters are confidential.

(2) The filing of papers with and the testimony given before the commission or masters is privileged communication.

(3) The commission shall make rules for the conduct of its affairs and provide for the confidentiality of its proceedings.

History: En. Sec. 6, Ch. 95, L. 1973.

93-724. Determination and order by supreme court. (1) The supreme court shall review the record of the proceedings and shall make such determination as it finds just and proper and may:

(a) order censure, suspension, removal or retirement of a judicial officer, or

(b) wholly reject the recommendation.

History: En. Sec. 7, Ch. 95, L. 1973.

93-725. Judicial officer not to participate in investigation of self or relative. A judicial officer who is a member of the commission or of the supreme court shall not participate in any proceeding involving his own censure, suspension, removal, or retirement or that of a relative within the sixth degree of consanguinity or that of the spouse of such a relative.

History: En. Sec. 8, Ch. 95, L. 1973.

93-726. Disqualification of judge pending criminal prosecution or proceeding before commission. A judge is disqualified from acting as a judge, without loss of salary, while there is pending:

(1) an indictment or an information charging him with a crime punishable as a felony under Montana or federal law, or

(2) a formal proceeding before the commission for his removal or retirement.

History: En. Sec. 9, Ch. 95, L. 1973.

93-727. Suspension on conviction of crime—final disposition. (1) On recommendation of the commission, the supreme court may suspend a judicial officer from office without salary when he pleads guilty or no contest or is found guilty of a crime punishable as a felony under Montana or federal law, or of any other crime involving moral turpitude.

(2) If his conviction is reversed, suspension terminates, and he shall be paid his salary for the period of suspension.

(3) If he is suspended and his conviction becomes final, the supreme court shall remove him from office.

History: En. Sec. 10, Ch. 95, L. 1973.

93-728. Order for retirement—removal. (1) Upon an order for retirement, the judicial officer shall be retired with the same rights and privileges as if he retired pursuant to statute.

(2) Upon an order for removal, the judicial officer shall be removed from office and his salary shall cease from the date of the order. He

shall be ineligible for any other judicial office and pending further order of the court is suspended from practicing law.

History: En. Sec. 11, Ch. 95, L. 1973.

CHAPTER 9—DISQUALIFICATION OF JUDICIAL OFFICERS

Section 93-901. Cases in which judge may be disqualified—calling in another judge.

93-901. (8868) Cases in which judge may be disqualified—calling in another judge. Any justice, judge, or justice of the peace must not sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;
3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order, or decision appealed from;
4. When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be pending.

In any judicial district having only one judge the affidavit of disqualification with reference to any action or proceeding to be tried before a jury must be filed at least one day before the day appointed or fixed by the court for setting the trial calendar; provided, however, this limitation shall not apply unless notice of such setting date shall be given to all parties by the clerk of the district court at least fifteen (15) days prior thereto. In all other cases the affidavit must be filed at least fifteen (15) days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (provided such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of fifteen (15) days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion, or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. No more than two judges can be disqualified in said action or proceeding, at the instance of the plaintiff, and no more than two at the instance of the defendant, in said action or proceeding, and this limitation shall apply however many parties or persons in interest may be plaintiffs or defendants in such action or proceeding. If there be more than one

judge in any judicial district in which said affidavit is made and filed, upon the first disqualification of a judge in the cause, another judge, residing in the judicial district wherein the affidavit is made and filed, must be called in to preside in such action, motion or proceeding; upon the second or any subsequent disqualification of a judge in the cause, a district judge of another judicial district of the state must be called in to preside in such action, motion, or proceeding, or the action, motion, or proceeding transferred to a district judge of another judicial district of the state; when another judge has assumed jurisdiction of an action, motion, or proceeding, the clerk of the district court in which the same was pending, shall at once notify the parties or their attorneys of record in the same, either personally or by registered mail, of the name of the judge called in, or to whom such action, motion, or proceeding was transferred. Such second or subsequent affidavit of disqualification shall be filed with the clerk of the district court in which such action, motion or proceeding may be pending within three days after the party or his attorney of record, filing such affidavit, has received notice as to the judge assuming jurisdiction of such action, motion, or proceeding.

History: Ap. p. Sec. 453, p. 134, *Bannack Stat.*; re-en. Sec. 610, p. 159, *Cod. Stat. 1871*; re-en. Sec. 530, p. 179, *L. 1877*; re-en. Sec. 530, 1st Div. *Rev. Stat. 1879*; re-en. Sec. 547, 1st Div. *Comp. Stat. 1887*; amd. Sec. 180, *C. Civ. Proc. 1895*; amd. Ch. 3, 2nd Ex. *L. 1903*; re-en. Sec. 6315, *Rev. C. 1907*; amd. Sec. 1, Ch. 114, *L. 1909*; re-en. Sec. 8868, *R. C. M. 1921*; amd. Sec. 1, Ch. 93, *L. 1927*; amd. Sec. 1, Ch. 218, *L. 1961*; amd. Sec. 1, Ch. 82, *L. 1963*; amd. Sec. 1, Ch. 234, *L. 1965*. *Cal. C. Civ. Proc. Sec. 170*.

Amendment

The 1965 amendment deleted "by reason of the bias or prejudice of such judge" at the end of the first sentence of subdivision 4; divided subdivision 4 into two paragraphs; and made a minor change in punctuation.

Repealing Clause

Section 2 of Ch. 234, *Laws 1965* repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3, of Ch. 234, *Laws 1965* provided the act should be in effect from and after its passage and approval. Approved March 8, 1965.

Constitutionality

The 1965 amendment of this section, deleting the words "by reason of the bias and prejudice of such judge," does not impair the constitutionality of this section, since the affidavit will still be required to state that the party has reason to believe and does believe he cannot have a fair and impartial hearing or trial before the dis-

trict judge. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

This section does not violate the separation of powers provision of section 1, article IV of the Montana constitution in that it does not impinge upon the existence or supremacy of the judicial system nor alter its jurisdiction or duties, but is a reasonable manner of providing a fair trial for all litigants. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

Compelling Disqualification

Where district court judge attempted to comply with affidavit of disqualification, but was unsuccessful in calling in a district court judge from another judicial district, and was also unsuccessful in attempting to comply with order to show cause, mandamus proceedings against him were dropped but not against a second district court judge who believed he had original jurisdiction and challenged the constitutionality of this section. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

Custody Award

District court judge was without jurisdiction to award custody where affidavits of disqualification were filed prior to court's final disposition of various motions even though motion for new trial was pending. *State ex rel. Ross v. District Court*, 150 M 233, 433 P 2d 778.

Jurisdiction of Disqualified Judge

Trial court, presiding in disqualified judge's stead, was without jurisdiction to dismiss complaint where trial court had not been called to assume jurisdiction

and no notice was given to the parties or their attorneys that another judge had been called in or that the action had been transferred to another judge. *Wheeler v. Moe*, — M —, 515 P 2d 679.

Mandamus

Mandamus is the appropriate remedy to compel a disqualified judge to perform a mandatory duty resting upon him to call in another judge or transfer the cause to another department or court. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

New Trial

This section should not be construed to permit disqualification of a judge pending motion for a new trial because of the provisions of Rule 59(d), M. R. Civ. P. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

Parties Entitled to File

Grandnephew who claimed heirship in an intestate estate and who filed a petition to determine heirship was a party within the meaning of this section, and district court erred in quashing timely affidavit of disqualification filed by him. *In re Estate of Brown*, 158 M 413, 492 P 2d 914.

Pretrial Hearing

Affidavit to disqualify judge from non-jury trial was valid where filed fifteen days prior to trial date despite party's previous consent to a determination of motions at pretrial hearing presided over by judge named in disqualification affidavit. *State ex rel. OB-Gyn Group of Billings, Montana v. District Court*, 159 M 1, 494 P 2d 931.

Remanded Cause

District judge should have honored affidavit of disqualification filed more than

four months before day fixed for hearing where mandate of supreme court in remanding cause left it to the district court to make a determination as to the amount due the plaintiffs in the event that sum was not settled between the parties themselves. *State ex rel. Gage v. District Court*, 148 M 284, 419 P 2d 746, 747.

Time for Disqualification

Statutory time for filing affidavit was not extended because counsel learned of trial only day before it began, since under this section attorney's right to request disqualification is derived from party's right and is not an independent right. *State ex rel. Kidder v. District Court of Fourth Judicial District In and For County of Sanders*, 155 M 442, 472 P 2d 1008.

Affidavit filed three days after plaintiff's counsel received notice of hearing was timely where plaintiff resided in Lake County and was required to travel to Missoula to sign the affidavit and where court was closed another intervening day. *Wheeler v. Moe*, — M —, 515 P 2d 679.

Motion for disqualification of judge was a flagrant abuse of section 93-1101 where affidavit was filed three weeks subsequent to denial of petition for restoration to capacity and petition for restoration was again filed and oral argument heard on same evidence, resulting in granting of petition for restoration; writ of supervisory control was issued ordering grant of guardian's motion to quash second petition. *Application of Stewart*, — M —, 517 P 2d 879.

References

State ex rel. Wilson v. District Court, 143 M 543, 393 P 2d 39; *State ex rel. McNeal v. District Court*, 144 M 550, 399 P 2d 997; *State ex rel. Kinman v. District Court*, 146 M 74, 404 P 2d 517.

CHAPTER 11—MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS

- Section 93-1107. Judges' retirement system—definitions.
 93-1109. [Transferred.]
 93-1110. Administrative expenses.
 93-1111. Payments into the Montana judges' retirement fund—investment.
 93-1112. Rules and regulations—actuarial data.
 93-1113. Membership.
 93-1114. Service allowance.
 93-1115. Payments by contributors.
 93-1116. Contributions by the state of Montana.
 93-1117. Vesting of proportional retirement.
 93-1118. Retirement allowance.
 93-1119. Disability retirement allowance.
 93-1120. Involuntary retirement allowance.
 93-1121. Penalty retirement allowance.
 93-1122. Refunds in case of resignation or discharge.

- 93-1123. Payments upon death.
- 93-1124. Payments in case of death from natural cause.
- 93-1125. Monthly payments of retirement allowances.
- 93-1126. Exemption from taxes and execution.
- 93-1127. Nomination of beneficiary.
- 93-1128. Service in the armed forces of the United States.
- 93-1129. Fraud—correction of errors.
- 93-1130. Call of retired judge for duty.
- 93-1131. Optional retirement allowance.
- 93-1132. Transfer of dormant accounts to pension accumulation fund.

93-1101. (8877) Subsequent applications for orders refused, etc.

Disqualification of Judge

Motion for disqualification of judge was a flagrant abuse of this section where affidavit was filed three weeks subsequent to denial of petition for restoration to capacity and petition for restoration was again filed and oral argument heard on same evidence, resulting in granting of petition for restoration; writ

of supervisory control was issued ordering grant of guardian's motion to quash second petition. Application of Stewart. — M —, 517 P 2d 879.

References

Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

93-1102. (8878) Violations of preceding section.

Frivolous Appeal

Where attorney specified as error in his appellate brief in a second action, the same point raised in his complaint in a previous action involving the same parties,

the appeal was frivolous and damages were assessed in favor of the respondents. Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

93-1107. Judges' retirement system—definitions. The following words and phrases as used in this act, unless a different meaning is plainly implied by the context, shall have the following meanings:

"Accumulated deductions"—the total of the amounts deducted from the salary of a contributor and paid into the fund, and standing to his credit in the fund, together with the regular interest thereon.

"Beneficiary"—shall be such person or persons having an insurable interest in his life as he shall nominate by written designation, duly acknowledged and filed with the board.

"Retired judge"—any person in receipt of a retirement allowance under this act.

"Board"—the Montana judges' retirement board.

"Penalty retirement age"—seventy (70) years of age.

"Contributor"—any person who has accumulated deductions in the fund standing to his credit.

"Final salary"—the annual salary for the office retired from as of the date of retirement.

"Actuarial equivalent"—the accumulated contributions and the present value of the member's state service based on length of service and member's attained age used to provide a life or temporary life income to the legally designated person, based on such person's attained age and sex at the time the option becomes available.

"Fund"—the Montana judges' retirement fund.

"Involuntary retirement"—a retirement not for cause and before retirement age.

"Member's annuity"—payments for life derived from contributions made by the contributor.

"Retirement allowance"—the state annuity plus the member's annuity.

"State annuity"—payments for life derived from contributions made by the state of Montana.

History: En. Sec. 1, Ch. 289, L. 1967; amd. Sec. 1, Ch. 218, L. 1969.

Compiler's Notes

Chapter 218, Laws 1969 was passed by the constitutional majority of both houses of the 41st legislative assembly over the veto of the governor.

Title of Act

An act relating to the judicial department of the state of Montana; providing for the retirement of district judges and justices of the supreme court, subject to thereafter being called into service for the performance of certain judicial duties under the direction of the supreme court and providing an allowance of actual expenses for such service; defining the terms used in this act; establishing a Montana judges' retirement system; creating a Montana judges' retirement board; providing for payment of the expense of administering this act, and for payments into the Montana judges' retirement fund; providing for the establishment and enforcement of rules and regulations; requiring membership in public employees' retirement system and for payments thereto by each judge not heretofore a member thereof; providing a service allowance based on length of service; requiring payments into the Montana

judges' retirement fund by deductions from members' salaries; providing for contributions by the state of Montana, and for payment into the Montana judges' retirement fund of one-quarter of fees collected by clerks of district court and by the clerk of the supreme court; specifying length of service and age requirements necessary for retirement; providing the method of computing retirement allowance; providing for a disability retirement allowance and an involuntary retirement allowance; specifying penalty retirement age and providing for a retirement allowance forfeiture; providing for payments upon death; providing for monthly payments of retirement allowances, for exemption from taxes and execution, for nomination of beneficiary, and for options available to judges entering military service; providing certain optional methods of payment of retirement allowance; providing for transfer of accounts dormant for ten (10) years; and providing a savings clause declaring the provisions of this act to be severable.

Amendments

The 1969 amendment rewrote the definition of "Final salary" which was formerly defined as "the annual current salary for the office retired from."

93-1108. Repealed.

Repeal

Section 93-1108 (Sec. 2, Ch. 289, L. 1967), relating to establishment of the

Montana judges' retirement system, was repealed by Sec. 103, Ch. 326, Laws of 1974.

93-1109. [Transferred.]

Compiler's Notes

Section 96, Ch. 326, Laws of 1974 renumbered this section as sec. 82A-210.2.

93-1110. Administrative expenses. (1) The expense of the administration of this act, exclusive of the payment of retirement allowances and other benefits, shall be paid from the Montana judges' retirement account.

(2) Before July 15, 1970 and before July 15 of each year thereafter, the board shall compute the administrative costs for the immediately preceding fiscal year and transfer that amount from the Montana

judges' retirement account to the public employees' retirement system account in the earmarked revenue fund.

History: En. Sec. 4, Ch. 289, L. 1967; substituted "from the Montana judges' retirement account" for "by the state of Montana, by appropriation out of the general fund, made on the basis of budgets submitted by the board" at the end and added subsection (2).
amd. Sec. 1, Ch. 23, L. 1969.

Amendments

The 1969 amendment designated the former section as subsection (1), and

93-1111. Payments into the Montana judges' retirement fund—investment. All appropriations made by the state of Montana, all contributions by members of the Montana judges, in the amount hereinafter specified, and all interest on and increase of the investments and moneys under this account shall be paid to the secretary of the public employees' retirement system board (PERS), who shall credit said payments to the Montana judges' retirement fund. Said funds may be co-mingled with funds of the PERS, but shall be earmarked as judges' retirement fund.

History: En. Sec. 5, Ch. 289, L. 1967.

93-1112. Rules and regulations—actuarial data. The board may establish such rules and regulations as it deems necessary and is charged within the limitations of this act for its proper administration, operation, and enforcement, and shall be the authority under this act for its proper administration, operation, and enforcement, and shall be the authority under this act as to the conditions under which persons may be admitted to and continue to receive benefits under the retirement system. It shall keep such data as shall be necessary for actuarial valuation purposes. It shall cause to be made periodic actuarial investigations into the mortality and service experience of the contributors to and the beneficiaries of the fund, and shall adopt for the retirement system one or more mortality tables.

History: En. Sec. 6, Ch. 289, L. 1967.

93-1113. Membership. (a) Any judge or justice, who has, previous to the adoption of this act, been a member of the PERS, may elect to remain under that system; such election to be made in writing to the PERS board within three (3) months after the effective date of this act.

(b) Every judge or justice who was in service in either a district court or a supreme court of the state of Montana, prior to July 1, 1967, shall have the option and he may elect to make back payments to the date when he first entered the service of the judiciary. Such back payments may be spread over a period of five (5) years by having the regular payroll deduction of the contributor increased in an amount equal to the total of his back payments divided by sixty (60), which deduction increase shall be credited to such back payments owing, and shall be continued until the full amount of such back payments shall have been completed. Any such deduction increase may be anticipated in part or in full by the contributor at any time and must be anticipated in full at the time of retirement before a retirement allowance is granted, and if not so

anticipated and paid in full then a member's retirement allowance shall be calculated for the total years and months on which contributions have been made in accordance with section 12 [93-1118] of this act. Every contributor who shall elect to make such back payments shall receive full credit under this act for all contributions made into the fund and for all service credits to which he might thereby be entitled.

History: En. Sec. 7, Ch. 289, L. 1967.

93-1114. Service allowance. In computing the length of service of a contributor for retirement purposes, full credit shall be given to each contributor for each year of service rendered to the judiciary including service rendered prior to July 1, 1967, upon complying with the provisions of this act. As soon as practicable, the retirement board shall issue to each original member a certificate certifying the aggregate length of his service prior to July 1, 1967. Such certificate shall be final and conclusive as to his prior service unless thereafter modified by the board upon application of the contributor.

History: En. Sec. 8, Ch. 289, L. 1967.

93-1115. Payments by contributors. Every member shall be required to contribute into the fund a sum equal to six per cent (6%) of his monthly salary, which sum shall be deducted from his salary and credited to his account in the fund.

History: En. Sec. 9, Ch. 289, L. 1967.

93-1116. Contributions by the state of Montana. The state of Montana shall monthly contribute to the fund a sum equal to six per cent (6%) of the salary of each member of the Montana judiciary retirement system. In addition to the above, three-quarters ($\frac{3}{4}$) of the fees collected under section 25-232, as amended, and section 25-233, as amended, shall be paid into the county treasurer on the first Monday of each month as provided in section 25-203, and the other one-quarter shall be transmitted by the clerk to the secretary of the PERS board on the first Monday of each month, and by him credited to the judicial retirement fund. The fees collected under section 82-503, as amended, shall be by the clerk of the supreme court paid by him, three-quarters ($\frac{3}{4}$) into the state treasury to be credited to the general fund, and one-quarter ($\frac{1}{4}$) of which shall be paid by him to the secretary of the PERS board, which shall be credited to the credit of the judicial retirement fund. The full amount of such fund as created and accumulated is hereby set aside to be used exclusively for the purpose of paying the accrued retirement and expenses provided for herein.

History: En. Sec. 10, Ch. 289, L. 1967.

93-1117. Vesting of proportional retirement. Any member who has completed at least five (5) years or more service, and has reached the age of sixty-five (65), may retire and receive the proportional retirement allowances provided in section 12 [93-1118].

History: En. Sec. 11, Ch. 289, L. 1967.

93-1118. Retirement allowance. Upon retirement from service a member shall receive a service retirement allowance which shall consist of the state annuity plus the member's annuity. The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement and the state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of three and one-third per cent ($3\frac{1}{3}\%$) per year of his final salary for the first fifteen (15) years' service, and one per cent (1%) per year for each year's service thereafter.

History: En. Sec. 12, Ch. 289, L. 1967.

93-1119. Disability retirement allowance. In case of the total disability of a contributor, permanent in character, regardless of length of service of the contributor, a disability retirement allowance shall be granted the contributor in an amount calculated on the actuarial equivalent of the member's annuity and the state annuity standing to his credit at the time of his disability retirement; provided, that if such total disability is a direct result of any service to the Montana judiciary in line of duty, then such judge or justice who is totally and permanently disabled shall be retired on total retirement allowance of a minimum of one-half ($\frac{1}{2}$) of his final salary or the allowance provided in section 12 [93-1118], whichever is greater. In the event of any disability not caused in the line of duty after attaining the age of sixty (60) years, the maximum monthly payment shall be the retirement allowance as provided in section 12 [93-1118].

History: En. Sec. 13, Ch. 289, L. 1967.

93-1120. Involuntary retirement allowance. Should a contributor be discontinued from service, not voluntarily, after having completed five (5) years of total service, but before reaching retirement age, he shall, upon filing of application in the manner herein provided for retirement, be paid as he may elect as follows:

(a) the full amount of accumulated deductions standing to his credit; or

(b) a member's annuity of equivalent actuarial value to his accumulated deductions standing to his credit, plus the actuarial equivalent of a state annuity having a value equal to the present value of a state annuity then standing to his credit.

History: En. Sec. 14, Ch. 289, L. 1967.

93-1121. Penalty retirement allowance. Any judge or justice who becomes eligible for retirement hereunder, but fails to make application therefor, prior to his attaining the age of seventy (70) years, shall automatically waive all retirement benefits, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him; save and except that any judge or justice, who is over the age of seventy (70) years, at the time of the effective date of this act, or who shall attain such age before the expiration of his term, shall be permitted to serve out

the balance of his existing term, without forfeiting said retirement. At the termination of the said existing term, if such member has failed to make application for retirement under this act, he shall automatically waive all retirement benefits hereunder, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him.

History: En. Sec. 15, Ch. 289, L. 1967. **Compiler's Notes**

This act became effective July 1, 1967.

93-1122. Refunds in case of resignation or discharge. Where a contributor resigns of his own volition, or is discharged for cause before becoming entitled to a retirement allowance, then the deductions standing to his credit shall be paid to him.

History: En. Sec. 16, Ch. 289, L. 1967.

93-1123. Payments upon death. If the board shall find that a contributor died as a direct and proximate result of injury received in the course of his employment, a retirement allowance shall be paid to his beneficiary. Such retirement allowance shall consist of:

(a) a member's annuity which shall be the actuarial equivalent of the contributor's accumulated deductions standing to his credit; and

(b) the actuarial equivalent of a state annuity which when added to the member's annuity will provide a total annuity equal to the allowance provided for in section 12 [93-1118].

History: En. Sec. 17, Ch. 289, L. 1967.

93-1124. Payments in case of death from natural cause. (a) If the retired judge or justice dies before receiving in payments the present value of his member's annuity and the state annuity as it was at the time of his retirement, the balance shall be paid to his beneficiary.

(b) If a member dies before reaching retirement age, his beneficiary shall be entitled to the actuarial equivalent of the options as provided in section 14 [93-1120].

History: En. Sec. 18, Ch. 289, L. 1967.

93-1125. Monthly payments of retirement allowances. The retirement allowances granted under the provisions of this act shall be paid in equal monthly installments and shall not be increased, decreased, revoked or repealed unless by act of the legislative assembly of the state of Montana. No retirement allowances can be approved by the board while the member is drawing full compensation as a judge or justice.

History: En. Sec. 19, Ch. 289, L. 1967.

93-1126. Exemption from taxes and execution. Any money received or to be paid as a member's annuity, state annuity or return of deductions or the right of any of these, shall be exempt from any state or municipal tax and from levy, sale, garnishment, attachment or any other process whatsoever and shall be unassignable.

History: En. Sec. 20, Ch. 289, L. 1967.

93-1127. Nomination of beneficiary. Every contributor shall have the authority to name his beneficiary by written designation duly acknowledged and filed with the board.

History: En. Sec. 21, Ch. 289, L. 1967.

93-1128. Service in the armed forces of the United States. Any member of the Montana judiciary now in or hereafter inducted into the armed forces of the United States, shall have the option:

(a) to continue his payments into the fund; or

(b) allow the board to make his payments for him during such military service, in which event he shall repay the fund the full amount of such payments upon his return to the Montana judiciary, and such repayments must be made within two (2) years after his return to the judiciary provided that a member's service in the armed forces of the United States shall be credited to and made a part of the member's service allowance.

History: En. Sec. 22, Ch. 289, L. 1967.

93-1129. Fraud—correction of errors. (a) No person shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of the retirement system herein established in any attempt to defraud such system.

(b) Should any such change in records fraudulently made or any mistake in records inadvertently made result in any contributor or beneficiary receiving more or less than he would have been entitled to had the records been correct, then, on the discovery of such error, the board shall correct such error and shall adjust the payments which shall be made to the contributor or annuitant in such manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

Any person violating any of the provisions of subsection (a) of this section shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1,000) or suffer imprisonment not exceeding one (1) year, or both, in the discretion of the court.

History: En. Sec. 23, Ch. 289, L. 1967.

93-1130. Call of retired judge for duty. Every judge or justice receiving retirement pay under the provisions of this act, shall, if physically and mentally able, be subject to call by the supreme court or the chief justice thereof to aid and assist the supreme court or any district court under such directions as the supreme court may give, including the examination of the facts and cases before the court, the examination of authorities cited and the preparation of opinions for and on behalf of the court, which opinions, when and if and to the extent approved by the court, may by the court be ordered to constitute the opinion of such court and such court and such retired judge or justice may, subject to any rule which the supreme court may adopt, perform any and all duties preliminary to the final disposition of cases in so far as not inconsistent with the constitution of the state. Such retired judge or justice when called

to service as herein provided shall be reimbursed for his actual expenses, if any, in responding to such call.

History: En. Sec. 24, Ch. 289, L. 1967.

93-1131. Optional retirement allowance. Until the first payment on account of any retirement allowance is made and subject to the conditions that, if he die after retirement and within thirty (30) days from the date upon which his election or changed election is received at the office of the retirement board, then said election is void and of no effect, and the death shall be considered as that of a member before retirement. A member or a beneficiary may elect, or revoke or change a previous election prior to the approval of the previous election to receive the actuarial equivalent of his retirement allowance as of the date of retirement, in a lesser retirement, allowance, payable throughout life with one of the following options:

Option 1. Upon his death, his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board at the time of his retirement.

Option 2. Upon his death, one-half ($\frac{1}{2}$) of his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board at the time of his retirement.

Option 3. Such other benefit or benefits shall be paid, either to the beneficiary or to such other person or persons as he nominates, as, together with such lesser retirement allowance, are the actuarial equivalent of his retirement allowance, and shall be approved by the board.

History: En. Sec. 25, Ch. 289, L. 1967.

93-1132. Transfer of dormant accounts to pension accumulation fund. The board may in its discretion transfer the savings account of a member to the pension accumulation fund if the account has been dormant for a period of ten (10) years, provided that no right of the member shall be jeopardized by such transfer and the savings account shall be transferred to the member's name upon subsequent re-entry to membership.

History: En. Sec. 27, Ch. 289, L. 1967.

Separability Clause

Section 26 of Ch. 289, Laws 1967 read "The provisions of this act are severable, and, if any of its provisions shall be held to be unconstitutional, the decision of the

court shall not affect or impair any of the remaining provisions. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included herein."

CHAPTER 12—JURIES—DIFFERENT KINDS DEFINED

Section 93-1205. Number of a trial jury.

93-1205. (8887) Number of a trial jury. A trial jury consists of twelve (12) persons; provided, that in civil actions and cases of misde-

meanor, it may consist of twelve (12), or any number less than twelve (12), upon which the parties may agree in open court, and further provided that in all civil actions where the relief asked for in the complaint is under the sum of ten thousand dollars (\$10,000), then a trial jury may in the discretion of the trial judge consist of six (6) persons, and that two-thirds ($\frac{2}{3}$) of the jury may render a verdict; provided further, that where a six (6) person jury is authorized by law, each side shall have two (2) peremptory challenges, and they shall be exercised by the plaintiff first striking one (1), and the defendant then striking one (1), and so on, until each side has exhausted or waived his rights.

History: En. Sec. 224, C. Civ. Proc. 1895; re-en. Sec. 6334, Rev. C. 1907; re-en. Sec. 8887, R. C. M. 1921; amd. Sec. 4, Ch. 203, L. 1939; amd. Sec. 1, Ch. 293, L. 1971. Cal. C. Civ. Proc. Sec. 194.

Amendments

The 1971 amendment added the second and third provisos; and made minor changes in style.

93-1206. (8888) Juries in justices' courts.

Cross-References Trial of criminal cases in justice and police courts, sec. 95-2004.
Formation of criminal trial jury in justice or police court, sec. 95-2005.

CHAPTER 13—JURORS—QUALIFICATIONS AND EXEMPTIONS

Section 93-1301. Who competent to act as juror.

93-1304. Who exempt from jury duty.

93-1301. (8890) Who competent to act as juror. A person is competent to act as a juror if:

1. A citizen of the United States of the age of eighteen (18) years, who shall have been a resident of the state one (1) year, and of the county ninety (90) days before being selected and returned.

2 to 4. * * * [Same as parent volume.]

History: Earlier statutes were Sec. 8, p. 506, Cod. Stat. 1871; amd. Sec. 1, p. 70, L. 1873; re-en. Sec. 780, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 57, L. 1881; re-en. Sec. 1304, 5th Div. Comp. Stat. 1887; re-en. Sec. 230, C. Civ. Proc. 1895; re-en. Sec. 6337, Rev. C. 1907; re-en. Sec. 8890, R. C. M. 1921; amd. Sec. 6, Ch. 203, L. 1939; amd. Sec. 1, Ch. 116, L. 1965; amd. Sec. 20, Ch. 240, L. 1971; amd. Sec. 32, Ch. 94, L. 1973. Cal. C. Civ. Proc. Sec. 198.

more than seventy" after "age of twenty-one" in paragraph 1.

The 1971 amendment reduced the minimum age specified in subdivision 1 from 21 to 19 years; and made minor changes in style.

The 1973 amendment reduced the minimum age specified in subdivision 1 from nineteen to eighteen years.

Repealing Clause

Section 2 of Ch. 116, Laws 1965 repealed all acts and parts of acts in conflict therewith.

Amendments

The 1965 amendment deleted "and not

93-1304. (8893) Who exempt from jury duty. A person is exempt from liability to act as juror if:

1. * * * [Same as parent volume.]

2. A person holding a public office in the state, a county, township, or town;

3. to 6. * * * [Same as parent volume.]

7. An officer, keeper or attendant of a hospital, asylum, or other charitable institution;

8. and 9. * * * [Same as parent volume.]

10. An active member of the national guard of Montana, or an active member of a fire department of any city or town of this state. The number of firemen hereby exempted must not exceed twenty-eight (28), including officers for each company organized; and such members from each company must be selected from the roll of such company, according to the seniority of membership, and a list containing the names of such persons must be made out by the secretary of each company and filed with the clerk of the board of county commissioners on the first Mondays of December, March, June and September, and any failure to file the list hereby required is considered a waiver of such exemption.

11. and 12. * * * [Same as parent volume.]

The court must discharge a person from serving as a trial juror, in either of the following cases:

Where it satisfactorily appears that he or she is not competent; and,

Where it satisfactorily appears that he or she is exempt and claims the benefit of exemption.

History: Ap. p. Sec. 9, p. 506, Cod. Stat. 1871; re-en. Sec. 781, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 56, L. 1881; amd. Sec. 1, p. 101, L. 1883; re-en. Sec. 1305, 5th Div. Comp. Stat. 1887; amd. Sec. 232, C. Civ. Proc. 1895; re-en. Sec. 6339, Rev. C. 1907; amd. Sec. 1, Ch. 20, L. 1917; re-en. Sec. 8893, R. C. M. 1921; amd. Sec. 7, Ch. 203, L. 1939; amd. Sec. 1,

Ch. 425, L. 1971. Cal. C. Civ. Proc. Sec. 200.

Amendments

The 1971 amendment inserted "in the state" in subdivision 2; deleted "almshouse" in subdivision 7; and made minor changes in phraseology and style.

CHAPTER 14—JURORS—SELECTION AND RETURN

Section 93-1404. Duty of clerk—jury boxes.

93-1404. (8899) **Duty of clerk—jury boxes.** The clerk shall prepare and keep a jury box and contents as follows: The number of each juror shall be written, typed or stamped on paper or other suitable material, identical in all respects, and placed in a box of ample size to permit said numbers to be thoroughly mixed, and which said box shall be kept for that purpose and shall be known as, and plainly marked, "jury box No. 1." The numbers may be used as often as necessary; provided, however, none shall be used which is in any manner whatsoever defaced or disfigured, or so marked that it may be recognized or distinguished from the others in said jury box No. 1 except by the number thereon. There shall be so enclosed in said box one number, and only one number, corresponding to the number before the name of each juror on the jury list.

History: En. Sec. 243, C. Civ. Proc. 1895; re-en. Sec. 6345, Rev. C. 1907; amd. Sec. 1, Ch. 35, L. 1919; re-en. Sec. 8899,

R. C. M. 1921; amd. Sec. 2, Ch. 168, L. 1957; amd. Sec. 1, Ch. 110, L. 1969. Cal. C. Civ. Proc. Sec. 209.

Amendments

The 1969 amendment deleted "and enclosed in separate black capsules" after "suitable material"; substituted references to "numbers" for references to "capsules"

wherever appearing; and, in the last sentence, substituted "number before the name of each juror" for "corresponding to the name of each juror."

DECISIONS UNDER FORMER LAW**Color of Capsules**

Identical opaque capsules, though not black as formerly required by statute, were not such deviation as to constitute material departure from provisions of statute since the price of black capsules was approximately five times that of other avail-

able capsules, and hence an additional burden on taxpayer, and since no unfairness in selection of jurors would result from using another opaque colored capsule. In re Jury Box Capsules, 150 M 583, 447 P 2d 687.

CHAPTER 15—JURORS—DRAWING AND SUMMONING FOR COURTS OF RECORD

Section 93-1503. Drawing—how conducted.

93-1512. Drawing additional jurors when original number insufficient—order designating number needed—selection from portion of county only—notification of jurors.

93-1503. (8904) Drawing — how conducted. 1. The clerk must place said box on a rod so that the same may readily revolve and said box must be revolved a sufficient number of times so as to ensure that the numbered slips in said box shall become thoroughly mixed, and thereafter the judge must draw from said box one (1) at a time, as many of the numbered slips as are ordered by the court.

2 and 3. * * * [Same as parent volume.]

4. No person shall be asked to serve on more than one term during any year unless all the numbers in jury box No. 1 have been drawn and there are no other qualified jurors available.

History: En. Sec. 262, C. Civ. Proc. 1895; re-en. Sec. 6350, Rev. C. 1907; amd. Sec. 2, Ch. 35, L. 1919; re-en. Sec. 8904, R. C. M. 1921; amd. Sec. 1, Ch. 148, L. 1933; amd. Sec. 2, Ch. 151, L. 1937; amd. Sec. 2, Ch. 3, L. 1939; amd. Sec. 4, Ch. 168, L. 1957; amd. Sec. 2, Ch. 110, L. 1969. Cal. C. Civ. Proc. Sec. 219.

Amendments

The 1969 amendment, in subsection (1), twice substituted "numbered slips" for "capsules," the latter referring to separate black capsules containing each juror's number; substituted "the" for "such" before the last reference to "numbered slips"; and added subsection (4).

93-1504 to 93-1506. (8905 to 8907) Repealed.

Repeal

Sections 93-1504 to 93-1506 (Secs. 263 to 265, C. Civ. Proc. 1895; Secs. 3 to 5, Ch. 35, L. 1919; Sec. 2, Ch. 148, L. 1933;

Secs. 5 to 7, Ch. 168, L. 1957), relating to the drawing of jurors from jury boxes Nos. 2 and 3, were repealed by Sec. 4, Ch. 110, Laws 1969.

93-1510, 93-1511. (8911, 8912) Repealed.

Repeal

Sections 93-1510 and 93-1511 (Secs. 281, 282, C. Civ. Proc. 1895; Secs. 8, 9,

Ch. 168, L. 1957), relating to the drawing and summoning of jurors, were repealed by Sec. 4, Ch. 110, Laws 1969.

93-1512. Drawing additional jurors when original number insufficient—order designating number needed—selection from portion of county

only—notification of jurors. Whenever it appears to a district judge that additional jurors will be needed for any term or trial the judge shall draw as many numbers from jury box No. 1 as are necessary to secure the required number of additional jurors. Before drawing the numbers the judge shall by appropriate order designate the number of jurors needed, and, when the judge believes that securing the additional jurors from all of the county would cause unnecessary delay or expense then he may order the jurors selected from only a designated portion of the county, which portion shall never be less than the corporate limits of the county seat. If, in the selection of the additional jurors, a number is drawn and the jury list shows the person represented by the number to be a resident of an area outside the area designated by the court order then that number shall be returned to the jury box and a new number drawn. When the required number of names have been selected the judge may order the prospective jurors notified by telephone by the clerk of the court or he may order them summoned by the sheriff either by certified mail or by personal service.

History: En. Sec. 3, Ch. 110, L. 1969.

ing sections 93-1504, 93-1505, 93-1506, 93-1510 and 93-1511, R. C. M. 1947.

Title of Act

An act amending sections 93-1404 and 93-1503, R. C. M. 1947, to provide for a change in the method of drawing jurors and to eliminate the jury boxes numbered two and three and to provide for a change in the method of notifying jurors; repeal-

Repealing Clause

Section 4 of Ch. 110, Laws 1969 read "Sections 93-1504, 93-1505, 93-1506, 93-1510, and 93-1511, R. C. M. 1947, are repealed."

CHAPTER 16—JURORS—SUMMONING FOR JUSTICES' AND INFERIOR COURTS AND COURTS OF INQUEST

Section 93-1602. How to be summoned.

93-1602. (8914) How to be summoned. Such jurors must be summoned from the persons competent to serve as jurors, residents of the county, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

History: En. Sec. 291, C. Civ. Proc. 1895; re-en. Sec. 6360, Rev. C. 1907; re-en. Sec. 8914, R. C. M. 1921; amd. Sec. 14, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 231.

Amendments

The 1973 amendment substituted "county" for "township."

CHAPTER 18—JURIES—HOW IMPANELED—ALTERNATES

Section 93-1801. Grand jury—when and how to be impaneled.

93-1802. How constituted.

93-1801. (8918) Grand jury—when and how to be impaneled. Whenever in the opinion of the district judge a grand jury is necessary, he must make an order directing a grand jury to be drawn and summoned to attend before the court. The order must specify the number of such

jurors to be drawn, which must not be less than fifteen (15) nor more than twenty (20). The names of such jurors must be drawn from jury box No. 1, mentioned in section 93-1404, and the list of names certified and summoned, as provided for drawing and summoning trial jurors, and the names of any persons drawn who may not be impaneled upon the grand jury must be again placed in said jury box No. 1.

History: En. Sec. 320, C. Civ. Proc. 1895; re-en. Sec. 6364, Rev. C. 1907; re-en. Sec. 8918, R. C. M. 1921; amd. Sec. 4, Ch. 3, L. 1973. Cal. C. Civ. Proc. Sec. 241.

Amendments

The 1973 amendment increased the number of jurors specified in the second sentence from not less than ten nor more than fifteen to not less than fifteen nor more than twenty.

93-1802. (8919) How constituted. When, of the persons summoned as grand jurors competent and not excused, eleven (11) are present, they constitute the grand jury. If more than eleven (11) of such persons are present, the clerk must write their names on separate ballots, and place the ballots in black capsules, which the capsules shall be deposited in a box large enough to hold all of the capsules without crowding, and which the box shall be so arranged that the clerk drawing the capsules from the box shall be unable to observe or see the capsule he is about to draw, and draw out eleven (11) of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than eleven (11) of such persons are present, the court may order a sufficient number to be forthwith drawn from either box and summoned to attend the court. And whenever, of the persons to complete a grand jury, more attend than are required, the requisite number must be obtained by writing the names of those so summoned and not excused on ballots, which the ballots shall be placed in black capsules, and thereafter deposited in a box, and then drawn as above provided.

History: En. Sec. 321, C. Civ. Proc. 1895; re-en. Sec. 6365, Rev. C. 1907; amd. Sec. 7, Ch. 35, L. 1919; re-en. Sec. 8919, R. C. M. 1921; amd. Sec. 5, Ch. 3, L. 1973. Cal. C. Civ. Proc. Sec. 242.

Amendments

The 1973 amendment increased the number of jurors specified from seven to eleven in four places; and made minor changes in phraseology.

93-1803. (8920) Manner of impaneling grand jury prescribed.

Compiler's Notes

Sections 94-6301 to 94-6319 referred to in this section, were repealed by Sec. 2,

Ch. 196, Laws of 1967. For new law, see sections 95-1401 to 95-1409.

CHAPTER 19—COURT REPORTERS

Section 93-1906. Salary and expenses of reporter—apportionment.

93-1903. (8930) Matters written out and filed.

Compiler's Notes

Section 93-5505, referred to in this sec-

tion in the parent volume, was superseded by M. R. App. Civ. P., Rules 9, 10, and 25.

93-1906. (8933) Salary and expenses of reporter — apportionment. Every reporter appointed under the provisions of this chapter receives

an annual salary of twelve thousand five hundred dollars (\$12,500) and no other compensation except as provided in section 93-1904, provided, however, that all transcripts and bills of exceptions required by the county shall be furnished without cost, payable in monthly installments out of the general funds of the counties comprising the district for which he is appointed, according and in proportion to the number of civil and criminal actions entered and commenced in the district courts of such counties respectively in the preceding year; and it shall be the duty of the judge of such district, on the first day of January of each year, or as soon thereafter as may be, to apportion the amount of such salary to be paid by each county in his district on the basis aforesaid. The reporter is allowed, in addition to the salary and fees above provided, in judicial districts comprising more than one (1) county, his actual and necessary expenses of transportation and living when he goes on official business to a county of his judicial district other than the county in which he resides, from the time he leaves his place of residence until he returns thereto, said expenses to be apportioned and payable in the same way as the salary.

History: En. Sec. 375, C. Civ. Proc. 1895; re-en. Sec. 6378, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1909; re-en. Sec. 8933, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1927; amd. Sec. 1, Ch. 73, L. 1945; amd. Sec. 1, Ch. 49, L. 1951; amd. Sec. 1, Ch. 125, L. 1953; amd. Sec. 1, Ch. 76, L. 1955; amd. Sec. 6, Ch. 22, L. 1961; amd. Sec. 1, Ch. 114, L. 1965; amd. Sec. 1, Ch. 221, L. 1967; amd. Sec. 1, Ch. 192, L. 1969; amd. Sec. 1, Ch. 183, L. 1973. Cal. C. Civ. Proc. Secs. 271 and 274.

Amendments

The 1965 amendment increased the salary set forth near the beginning of the section from \$6,600 to \$7,800.

The 1967 amendment increased the annual salaries of court reporters from \$7,800 to \$8,800.

The 1969 amendment increased annual salaries of court reporters from \$8,800 to \$9,200.

The 1973 amendment increased the reporter's annual salary from \$9,200 to \$12,500.

CHAPTER 20—ATTORNEYS—QUALIFICATIONS—ADMISSION—LICENSE AND DISBARMENT

Section 93-2001. Who may be admitted as attorneys.

93-2001. (8936) Who may be admitted as attorneys. Any citizen or person, resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this state. All persons are attorneys of the supreme court who are entitled to practice in the supreme court when this code takes effect.

History: Earlier acts relating to admission and powers of attorneys were Secs. 1-15, pp. 370-373, Bannack Stat.; re-en. Secs. 1-15, pp. 375-378, Cod. Stat. 1871; re-en. Secs. 40-54, 5th Div. Rev. Stat. 1879; re-en. Secs. 102-116, 5th Div. Comp. Stat. 1887.

This section en. Sec. 390, C. Civ. Proc. 1895; re-en. Sec. 6381, Rev. C. 1907; re-en.

Sec. 8936, R. C. M. 1921; amd. Sec. 11, Ch. 168, L. 1971. Cal. C. Civ. Proc. Sec. 275.

Amendments

The 1971 amendment deleted "of the age of twenty-one years" from the first sentence.

93-2002. (8937) Qualifications, examination and admission.**Compiler's Notes**

Chapter 342, Laws 1974, purported to amend this section. However, on June 21, 1974, the Montana Supreme Court held the purported amendment unconstitutional and void. See annotation to *In re Senate Bill No. 630*, below.

Constitutionality

Grant of diploma privilege to graduates of University of Montana law school while requiring graduates of other accredited schools to take bar examination did not constitute an unconstitutional denial of equal protection of laws. *Goetz v. Harrison*, 154 M 274, 462 P 2d 891.

Diploma Privilege

Familiarity of supreme court justices with University of Montana law school and its faculty and students justifies continuation of practice of admitting graduates without examination. *Goetz v. Harrison*, 154 M 274, 462 P 2d 891.

93-2026. (8961) Disbarment of attorneys—causes—jurisdiction.**Conviction of Crime**

Conviction by a jury in a federal court of the offense of devising and intending to devise a scheme to defraud and to obtain money by means of false and fraudulent pretenses warranted attorney's disbarment. *In re Gross*, — M —, 503 P 2d 995, certiorari denied 410 US 991, 93 S Ct 1503.

Misappropriation

The conduct of an attorney in opening a checking account in the name of an estate of which he had been appointed executor and making withdrawals for his personal use constituted deceit and malpractice involving moral turpitude. *In re O'Donnell*, 143 M 51, 387 P 2d 303.

Moral Delinquencies in General

Disbarment was justified for attorney who had been previously disciplined by reprimand and who, after having been charged with debauching young girl, represented her procurer in criminal proceedings, represented both parties in procurer's divorce action, represented girl in quashing affidavit after procurer had mar-

Judicial Power

Under paragraph (3), section 2, article VII of the 1972 constitution, the supreme court has exclusive power to make rules governing admission to the bar and the conduct of its members, and the purported amendment of this section by Chapter 342, Laws of 1974, was patently void and in contravention of the principle of separation of powers set forth in section 1, article III of the 1972 constitution. *In re Senate Bill No. 630*, — M —, 523 P 2d 484.

Jurisdiction of District Court

District court had no jurisdiction of an action contesting the validity of this section and seeking restraining order against members of supreme court in their official capacity. *Goetz v. Harrison*, 153 M 403, 457 P 2d 911.

ried her, and represented another defendant charged with raping the girl. *In re Keast*, 159 M 311, 497 P 2d 103.

Moral Turpitude

Failure of attorney to make return of employees' withholding taxes was offense involving moral turpitude under this section so as to justify indefinite suspension from practice. *In re Kline*, 156 M 177, 477 P 2d 881.

Even though an act falls short of an offense involving moral turpitude under case law prior to adoption by the supreme court of the canons of professional ethics, it may justify disbarment. Even though an individual act or omission may in and of itself be insufficient grounds for action, repeated violations establishing a pattern of conduct revealing a gross disregard for the highest standards of honesty, justice or morality may and should be grounds for disbarment, suspension, censure or a request for surrender of license to practice law. *In re Advisory Opinion to Commission on Practice*, 156 M 514, 495 P 2d 1128.

CHAPTER 21—ATTORNEYS—POWERS—DUTIES—LIABILITIES AND COMPENSATION**93-2102. (8975) Change of attorney.****Death of Client**

Attorney was authorized to represent deceased client for whom there was filed a praecipe signed by counsel indicating withdrawal of previous counsel and re-

questing entry of name of new attorney for deceased even though signed and filed by counsel after death of client. *State ex rel. Ross v. District Court, Fourth Judicial Dist.*, 150 M 233, 433 P 2d 778.

93-2104. (8977) Death or removal of attorney.**Withdrawal of Attorney**

Adverse party was not required to advise the opposite party to appoint another lawyer or appear for himself where

the opposite party's lawyer, with the consent of that party, withdrew from the case. *Sikorski & Sons, Inc. v. Sikorski*, — M —, 512 P 2d 1147.

93-2106. (8979) Punishment for willful delay.**Actual Damages**

Under this section, only actual damages may be trebled, not the statutory interest due. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

gage with stipulation to receive client's inheritance when it came due, failure to give money to client under transaction, which was a breach of attorney's fiduciary duty, subjected attorney to treble damages. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

Fiduciary Duty

Where attorney paid off client's mort-

93-2112. (8985) Former public prosecutors not to defend, etc.**DECISIONS UNDER FORMER LAW****New Trial**

Under a repealed section prohibiting attorneys from defending prosecutions carried on formerly by themselves, convicted petitioner was not entitled to new trial merely on ground his voluntarily hired counsel had prosecuted him four years before, where petitioner at all times knew that his counsel was such former prosecutor, and where the trial at hand had no relation to any official duty performed by his counsel as prosecutor. In re *Petition of Allen*, — M —, 507 P 2d 1049.

defendant on another charge over seven years earlier was not a violation of defendant's constitutional rights; prosecution of an individual by a former county attorney did not forever prohibit that attorney from defending that individual on a separate and distinct criminal charge. *Petition of Pepperling*, — M —, 508 P 2d 569.

Waiver

Defendant who had choice of defense counsel and chose attorney who had prosecuted him in earlier case, waived any right to demand new trial based on such representation. *State v. Gallagher*, — M —, 509 P 2d 852.

Separate Charges

Appointment, as defense counsel, of attorney who had successfully prosecuted

93-2120. (8993) Lien for compensation.**Obligations of Third Parties**

Fact that settlement of personal injury claim by attorneys for their client incidentally benefited hospital by creating fund from which its bill for treatment of client could be paid did not create an implied contract by hospital to pay attorneys for their services; neither was hospital obligated to share settlement proceeds on a subrogation theory. *Sisters of Charity of Providence of Montana v. Nichols*, 157 M 106, 483 P 2d 279.

fees; attorneys and injured party could not require payment of a prorata share of attorneys' fees from that portion of settlement proceeds otherwise payable to hospital under its lien rights. *Sisters of Charity of Providence of Montana v. Nichols*, 157 M 106, 483 P 2d 279.

Priority of Liens

Where settlement in personal injury case was paid in three drafts, lien of attorneys representing injured party attached to all three drafts; since amount of drafts was sufficient to satisfy attorneys' fees in full, previously subordinate hospital lien became the senior outstanding lien against the balance of the settlement proceeds notwithstanding that attorneys did not actually collect their

Unemployment Compensation Cases

This section being in conflict with sections 87-142 and 87-143, relating to unemployment compensation claims, the latter sections, being more specific, should control over this section, which is more general, especially where, in light of the services rendered, the attorney's fees could be considered "necessaries" under section 87-143. *McAlear v. Unemployment Compensation Commission*, 145 M 458, 405 P 2d 219.

Waiver of Lien

Failure of attorney to deduct expenses incurred in obtaining award in case and

his expressed intention that he would collect expenses from future settlements constituted waiver of his lien for expenses.

Gross v. Holzworth, 151 M 179, 440 P 2d 765.

CHAPTER 25—LIMITATION OF ACTIONS FOR RECOVERY OF REAL PROPERTY

93-2504. (9015) Seizin within five years, etc.

Public Highway

Public highway was established by prescription on evidence that members of public had used road openly for more than fifty years without ever having obtained permission from owners, that previous

owner had considered road a public highway, that road had been maintained by county for some 24 years and that public had never been denied use of road. Kostbade v. Metier, 150 M 139, 432 P 2d 382.

93-2507. (9018) Possession—when presumed, etc.

Public Highway

Where county adversely paved and maintained a highway over the land of a private party for a period of more than ten years, such county acquired an easement by prescription over the land even though the private owner was assessed for and paid taxes on the property during the running of the statutory period. Brannon v. Lewis and Clark County, 143 M 200, 387 P 2d 706.

Use for Less than Statutory Period

Adverse use for less than full statutory period of five years confers no right or interest upon the adverse user, so that there was no consideration for an alleged contract granting an easement over another route. Larson v. Burnett, 158 M 421, 492 P 2d 921.

93-2508. (9019) Occupation under written instrument or judgment, etc.

Possession under Color of Title

Rancher, who received administrator's deed purporting to convey land, which deed was reviewed by two attorneys who failed to note the discrepancy in the deed and which deed also misled the right-of-way department for a power company which paid the rancher \$800 for an underground pipeline easement across the tract, occupied the land under claim or color of title within meaning of this section. Brown v. Cartwright, — M —, 515 P 2d 684.

Tolling of Statute

Statute of limitations did not toll during period when Indian plaintiff was attempting to persuade the United States to bring action against vendee of Indian's land on grounds that sale was fraudulent. Dillon v. Antler Land Co., 341 F Supp 734.

References

Rhodes v. Weigand, 145 M 542, 402 P 2d 588.

93-2509. (9020) What constitutes adverse possession, etc.

Possession under Color of Title

Certificate of assignment given to person paying delinquent taxes on realty did not give that person color of title and

did not bring him within ambit of this section. Magelssen v. Atwell, 152 M 409, 451 P 2d 103.

93-2511. (9022) What constitutes adverse possession, etc.

Conflicting Evidence

Finding of district court that adverse possession was not established was affirmed, in light of record disclosing conflicting testimony on question of existence and upkeep of fences and conflicting testimony on question whether and who ran livestock on property during the prescriptive period. Johnson v. Silver Bow County, 151 M 283, 443 P 2d 6.

Necessary Intent

No adverse possession was established where plaintiff did not, by any of actions, show requisite intent to possess adversely, particularly in view of letter in which plaintiff admitted that defendants owned the disputed land. Magelssen v. Atwell, 152 M 409, 451 P 2d 103.

93-2513. (9024) Occupancy and payment of taxes necessary, etc.**Burden of Proof**

The burden of proving all the essential elements of adverse possession is upon the party alleging it and he must prove that no taxes were levied or assessed against the land or that he has paid all taxes which were levied thereon. *Townsend v. Koukol*, 148 M 1, 416 P 2d 532, 536.

Easement

Where the county maintained and paved a highway over the land of a private party for a period of more than ten years, such county acquired an easement by prescription over the land and it was not necessary that the county pay taxes on the property during the statutory period. *Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

Essential Elements

To constitute adverse possession, the possession must be actual, feasible, exclusive, hostile and continuous for the full period of years and the party asserting adverse possession must have paid all the taxes levied and assessed upon the property during the statutory period. *Townsend v. Koukol*, 148 M 1, 416 P 2d 532, 535, 536.

Payment of Taxes

Since filing of a quiet title action

freezes the respective rights of the parties at the time of the commencement of the action, party who sought to quiet title to land in himself was unable to establish his right to title by paying back taxes on land after commencement of the action where the adverse possessor had, prior to commencement of the action, occupied and claimed the land for a period of five years continuously and had paid all taxes assessed upon the land during that period. *Brown v. Cartwright*, — M —, 515 P 2d 684.

Sufficiency of Possession

In quiet title action, plaintiff's knowledge of adverse claimant's acceptance of consideration from power company for the granting of an easement, plaintiff's lack of dispute of ownership upon adverse claimant's offer to sell him the tract involved, adverse claimant's continued use of the tract, his employment of a surveyor and erection of a fence on the premises and plaintiff's allowing adverse claimant to pay taxes on the tract for five years, sufficiently established adverse claimant's possession during statutory period. *Brown v. Cartwright*, — M —, 515 P 2d 684.

References

Rhodes v. Weigand, 145 M 542, 402 P 2d 588.

CHAPTER 26—LIMITATION OF OTHER ACTIONS

- Section 93-2612. Actions relating to bond issues, time for bringing.
 93-2619. Action for damages arising out of or resulting from construction of improvements to real property—ten years.
 93-2620. Exception—injury occurring during tenth year.
 93-2621. Responsibility of person in control not affected.
 93-2622. Time of completion of improvements to real property.
 93-2623. Other limitation periods not extended.
 93-2624. Actions for medical malpractice.

93-2603. (9029) Within eight years.**Nonparticipating Oil Royalty**

Where wife agreed to property settlement granting her a percentage of royalties should oil ever be found on land, such right did not vest until oil production

began and her action for royalties was not barred by the fact that it had been more than eight years since execution of the settlement. *Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739.

93-2604. (9030) Within five years.**Damage to Building from Broken Water Pipes**

This section did not apply to action by owners of apartment building against realtors for water damages to building from bursting of water pipes due to alleged negligence of realtors in caring for

the building. The claim was barred by statute of limitations relating to injury to or waste or trespass on property, section 93-2607. *Quitmeyer v. Theroux*, 144 M 302, 395 P 2d 965, 969, 970. (Dissenting opinion, 144 M 302, 395 P 2d 965, 971.)

Decedents' Estates

Five-year-limitation period under this section did not include time between decedent's death and issuance of letters of administration to defendant. *Cartwright v. Joyce*, 155 M 478, 473 P 2d 515.

Partial Bar by Statute

Fact that plaintiff had been awarded full judgment for services rendered without regard to limitation period under this

section did not require that entire verdict be set aside but only that the judgment be reduced by value of services rendered prior to five year period, since the claim was divisible. *Cartwright v. Joyce*, 155 M 478, 473 P 2d 515.

References

Hager v. Tandy, 146 M 531, 410 P 2d 447.

93-2605. (9031) Within three years.

Absence from State

Absence of alleged tort-feasor from state did not toll statute of limitations where it was possible to obtain service during the entire three-year period, under Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. *State ex rel. McGhee v. District Court, Sixteenth Judicial Dist., Fallon County*, — M —, 508 P 2d 130.

Amendment of Complaint

Three-year limitation for tort actions did not preclude amendment of complaint to correct misnomer by which defendant was referred to erroneously as Illinois corporation rather than as Delaware corporation; federal rule was applied in allowing the amendment. *Wentz v. Alberto Culver Co.*, 294 F Supp 1327.

Exhaustion of Administrative Remedies

Cause of action on statutory bond did not accrue until required administrative proceedings were complete and board had made final determination of amount due. *Montana Milk Control Board v. Hartford Accident & Indemnity Co.*, 153 M 299, 456 P 2d 302.

Fraudulent Concealment

Doctrine of fraudulent concealment was not applicable to medical malpractice case in which plaintiff alleged that doctor had failed to make a full disclosure of the experimental nature of the operation to be performed but admitted that he was informed in detail of the type of operation to be performed and that he consented to the operation and where, although doctor assured the plaintiff that he would be able to return to work within six months of the operation, plaintiff admitted to being totally disabled for six years after the operation and permanently partially disabled thereafter. *Monroe v. Harper*, — M —, 518 P 2d 788.

"Liability Created by Statute"

Action against county by motorist who

alleged he suffered personal injuries in a single vehicle accident due to negligent failure of county to properly maintain and mark a "T" intersection of county roads was subject to three-year statute of limitations under this section, rather than the two-year statute of limitations under 93-2607(1) as an action "upon a liability created by statute," since section 40-4402 waiving sovereign immunity to extent of county's liability insurance simply removes a defense previously available rather than creating a new cause of action. *State ex rel. Fallon County v. District Court, Sixteenth Judicial Dist., Fallon County*, — M —, 505 P 2d 120.

Malpractice

Where sponge had been left in patient's body in operation performed ten years previously, patient's cause of action for malpractice did not accrue until patient learned that such foreign object was in his body. *Johnson v. St. Patrick's Hospital*, 148 M 125, 417 P 2d 469, 473.

Product Liability

Where plaintiff developed cataracts following use of defendant's drug, there was question of fact as to whether publicity connecting the drug and cataracts was sufficient to put plaintiff on notice as to cause of his cataracts, thus to start the statute running, and motion for summary judgment for defendant, based on statute of limitations, was denied. *Hornung v. Richardson-Merrill, Inc.*, 317 F Supp 183.

Wrongful Death

This section, rather than section 93-2607, applies to an action from wrongful death. *Bryant v. Hall*, 157 M 28, 482 P 2d 147, overruling *Smith v. Wiprud*, 154 M 325, 463 P 2d 317.

References

Rhodes v. Weigand, 145 M 542, 402 P 2d 588.

93-2607. (9033) Two-year limitation.**Claim and Delivery**

In an action for claim and delivery, where possession by the defendant is rightful, the statute of limitations begins to run when the defendant refuses upon demand to return the property. *Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

Damage by Fire

Two-year statute of limitations under this section barred suit brought by the United States under section 82-1237 for damage to property caused by alleged negligence of defendants in setting forest fire. *United States v. Eytcheson*, 237 F Supp 371.

Damage to Building from Broken Water Pipes

Claim of owners of an apartment building against realtors for water damage to building from bursting of water pipes due to alleged negligence of realtors in caring for the building was barred by this section. Statute of limitations concerning implied contracts, section 93-2604, was inapplicable. *Quitmeyer v. Theroux*, 144 M 302, 395 P 2d 965, 969, 970. (Dissenting opinion, 144 M 302, 395 P 2d 965, 971.)

Fraud and Mistake

An action by administrator of estate of deceased against surviving partners to recover assets which had been transferred by deceased during his last illness was timely filed on July 25, 1960 where fraud was not discovered until December 1, 1958. *Marshall v. Minschmidt*, 148 M 263, 419 P 2d 486, 491.

Action to rescind contract for sale of real estate was barred when not brought within two years after discovery of fraud by all parties concerned. *Rock v. Birdwell*, 149 M 449, 429 P 2d 634.

Quiet title action based on husband's fraud of wife's community property and instituted within two years of discovery of facts constituting fraud was timely even though brought as counterclaim. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Trial court properly granted defendant's motion for summary judgment in action for fraudulent representation, or in alternative breach of contract, in sale of tractor since plaintiff's having failed to state claim in complaint for breach of contract made tort statute applicable and tort action was barred by this section. *Israelson v. Indian Tractor Co.*, 155 M 69, 467 P 2d 149.

Where plaintiff developed cataracts following use of defendant's drug, evidence that wide publicity had been given

to causal relationship between drug and cataracts did not establish that plaintiff was charged with knowledge of such relationship so as to constitute discovery under subsection 4 of this section. *Hornung v. Richardson-Merrill, Inc.*, 317 F Supp 183.

Injury to Personal Property

An action by an adoptive father and natural grandfather under section 93-2809 is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must be commenced within two years from the date the claim arose under subdivision 2 of this section. *LaTray v. Mannix Electric Co.*, 148 M 303, 419 P 2d 744, 745; but see *Bryant v. Hall*, 157 M 28, 482 P 2d 147.

Injury to Real Property

Where defendant's geophysical exploration injured plaintiff's real property, statute of limitations under subdivision 2 of this section was not tolled by plaintiff's decision to permit defendant to repair the damage with approximately one year remaining under the statute. *Carlson v. Ray Geophysical Division*, 156 M 450, 481 P 2d 327.

"Liability Created by Statute"

Action against county by motorist who alleged he suffered personal injuries in a single vehicle accident due to negligent failure of county to properly maintain and mark a "T" intersection of county roads was subject to three-year statute of limitations under section 93-2605, rather than two-year statute of limitations under subdivision (1) of this section as an action "upon a liability created by statute," since section 40-4402 waiving sovereign immunity to extent of county's liability insurance simply removes a defense previously existing rather than creating a new cause of action. *State ex rel. Fallon County v. District Court, Sixteenth Judicial Dist., Fallon County*, — M —, 505 P 2d 120.

Negligent Misrepresentation

Action for negligent misrepresentation is action for fraud within meaning of statute and is subject to two-year statute of limitations which begins to run when plaintiff acquires knowledge of facts constituting negligent misrepresentation. *Falls Sand & Gravel Co. v. Western Concrete, Inc.*, 270 F Supp 495.

Nuisance

In action for alleged well pollution, trial court erred in not limiting recovery to two years before filing date of complaint

since, under circumstances, pollution of ground water by dumping of glue waste was continuing temporary nuisance and this section applied. *Nelson v. C & C Plywood Corp.*, 154 M 414, 465 P 2d 314, 39 ALR 3d 893.

Two year statute of limitation was applicable to continuous and unremitting nuisance; recovery for damage occurring as a result of continuous and unremitting nuisance more than two years prior to the commencement of an action was barred by this section. *Lahman v. Rocky Mountain Phosphate Co.*, — M —, 504 P 2d 271.

Statutory Liability

The cause of action based on a railroad's statutory duty to maintain a cement drop, siphon and wooden flume on its right of way did not accrue on the taking of the right of way nor on the abandonment of the right of way and notice to water rights owners that it would no longer maintain the works, but

rather would accrue only after injury occurred from the railroad's failure to maintain the works. *Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

Cause of action under federal civil rights statute for improper search accrued at the time of the search, not at the time the search was adjudicated invalid or when criminal prosecution was terminated, so that action brought more than two years after the search was barred by this section. *Strung v. Anderson*, 452 F 2d 632.

Wrongful Death

Section 93-2605, rather than subdivision 2 of this section, applies to an action for wrongful death. *Bryant v. Hall*, 157 M 28, 482 P 2d 147, overruling *Smith v. Wiprud*, 154 M 325, 463 P 2d 317.

References

Rhodes v. Weigand, 145 M 542, 402 P 2d 588; *Hager v. Tandy*, 146 M 531, 410 P 2d 447.

93-2612. (9040) Actions relating to bond issues, time for bringing. No action can be brought for the purpose of restraining the issuance and sale of bonds or other obligations by the state of Montana or any school district, county, city, town, or political subdivision of the state, or for the purpose of restraining the levy and collection of taxes for the payment of such bonds or other obligations, after the expiration of sixty (60) days from the date of the election on such bonds or obligations or, if no election was held thereon, after the expiration of sixty (60) days from the date of the order, resolution or ordinance authorizing the issuance thereof, on account of any defect, irregularity, or informality in giving notice of or not holding the election; nor shall any defense based upon any such defect, irregularity, or informality be interposed in any action unless brought within this period. This section applies but is not limited to any action and defense in which the issue is raised whether a voted debt or liability has carried by the required majority vote of the electors qualified and offering to vote thereon.

History: En. Sec. 1, Ch. 114, L. 1919; re-en. Sec. 9040, R. C. M. 1921; amd. Sec. 15, Ch. 158, L. 1971.

Amendments

The 1971 amendment completely re-wrote this section. For prior text, see parent volume.

93-2613. (9041) Actions for relief not hereinbefore provided for.

References

Rhodes v. Weigand, 145 M 542, 402 P 2d 588.

93-2619. Action for damages arising out of or resulting from construction of improvements to real property—ten years. Except as provided in sections 2 and 3 [93-2620 and 93-2621] of this act, no action to recover damages (other than an action upon any contract, obligation, or liability, founded upon an instrument in writing) resulting from or arising

out of the design, planning, supervision, inspection, construction, or observation of construction of, or land surveying done in connection with, any improvement to real property shall be commenced more than ten (10) years after completion of such improvement.

History: En. Sec. 1, Ch. 60, L. 1971.

Title of Act

An act to provide a period of ten years within which an action for damages arising

out of certain services or work on improvements to real property must be commenced; and providing an effective date.

93-2620. **Exception—injury occurring during tenth year.** Notwithstanding the provisions of section 1 [93-2619] of this act, an action for such damages for an injury which occurred during the tenth year after such completion may be commenced within one (1) year after the occurrence of such injury.

History: En. Sec. 2, Ch. 60, L. 1971.

93-2621. **Responsibility of person in control not affected.** The limitation prescribed by this act shall not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement at the time a right of action arises.

History: En. Sec. 3, Ch. 60, L. 1971.

93-2622. **Time of completion of improvements to real property.** As used in this act, the term "completion" means that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier.

History: En. Sec. 4, Ch. 60, L. 1971.

93-2623. **Other limitation periods not extended.** Nothing in this act shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

History: En. Sec. 5, Ch. 60, L. 1971.

Effective Date

Section 6 of Ch. 60, Laws 1971 read "In order to provide a reasonable period for

commencement of any action for which a right of action has heretofore accrued, this act shall be effective January 1, 1972."

93-2624. **Actions for medical malpractice.** Action for injury or death against a physician or surgeon, dentist, registered nurse, nursing home administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall be commenced within three (3) years after the date of injury or three (3) years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury whichever occurs last, but in no case may such action be com-

menced after five (5) years from the date of injury. However, this time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known to him, or through the use of reasonable diligence subsequent to said act, error or omission would have been known to him.

History: En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973.

Title of Act

An act to prescribe the period of limitations in which actions for professional negligence can be commenced.

Amendments

The 1973 amendment inserted "nursing home administrator" and "long-term care facility" in the first sentence.

Fraudulent Concealment

Doctrine of fraudulent concealment

was not applicable to medical malpractice case in which plaintiff alleged that doctor had failed to make a full disclosure of the experimental nature of the operation to be performed but admitted that he was informed in detail of the type of operation to be performed and that he consented to the operation and where, although doctor assured plaintiff that he would be able to return to work within six months of the operation, plaintiff admitted to being totally disabled for six years after the operation and partially disabled thereafter. *Monroe v. Harper*, — M —, 518 P 2d 788.

CHAPTER 27—TIME OF COMMENCEMENT OF ACTIONS— GENERAL PROVISIONS CONCERNING

93-2702. (9048) Exception, where defendant is out of the state.

Service Possible

Absence of alleged tort-feasor from statute did not toll statute of limitations where it was possible to obtain service during the entire three-year period, under

Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. *State ex rel. McGhee v. District Court, Sixteenth Judicial Dist., Fallon County*, — M —, 508 P 2d 130.

93-2703. (9049) Exception as to persons under disabilities.

Insanity Tolling Statute

Where plaintiff was insane for approximately five months following personal injuries, statute did not begin to run until he recovered his sanity and action was

timely filed when commenced within statutory period after that date. *State ex rel. Hi-Ball Contractors, Inc. v. District Court*, 154 M 99, 460 P 2d 751.

93-2708. (9054) Provision where judgment has been reversed.

Dismissal of Counterclaim

Quiet title action based on husband's fraud of wife's community property instituted as counterclaim and timely brought under statute of limitations but dismissed on husband's motion may be properly instituted as principal action within one year after involuntary dismissal. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Neglect to Prosecute

Dismissal under M. R. Civ. P., Rule 41 (e), for failure to have summons issued within one year after commencement of the action is a dismissal for neglect to prosecute within the meaning of this section, and this section does not operate to permit the commencement of a new action after expiration of the statute of limitations. *State ex rel. Equity Supply Co. v. District Court*, 159 M 34, 494 P 2d 911.

CHAPTER 28—PARTIES TO CIVIL ACTIONS

93-2809. (9075) Parent or guardian may sue for injury, etc.

Limitation of Actions

An action by an adoptive father and natural grandfather under this section is

an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must

be commenced within two years from the date the claim arose under section 93-2607(2). *LaTray v. Mannix Electric Co.*, 148 M 303, 419 P 2d 744, 745, but see *Bryant v. Hall*, 157 M 28, 482 P 2d 147.

Mother Bringing Action

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife nor children and his father was dead. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

93-2810. (9067) When representative may sue for death, etc.

Limitation of Actions

An action under this section for wrongful death is governed by the three-year limitation in section 93-2605 rather than by the two-year limitation in section 93-2607. *Bryant v. Hall*, 157 M 28, 482 P 2d

147, overruling *Smith v. Wiprud*, 154 M 325, 463 P 2d 317.

References

Stiles v. Gove, 345 F 2d 991, 992.

93-2823. (9085) Tenants in common, etc., may sever in bringing, etc.

Assignor Bringing Action

Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to

compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. *Lowe & Lynn v. Flank Oil Co.*, 144 M 499, 398 P 2d 608.

93-2824. (9086) Action—when not to abate by death, marriage, etc.

Loss of Earnings

Where, in survivorship action under this section, jury returned verdict based only upon personal property belonging to decedent destroyed in accident, and awarded no damages for loss of earning capacity, district court did not abuse its discretion in granting new trial on damages only, since jury could not "disregard uncontradicted, credible nonopinion evidence" establishing decedent's earning capacity. *Putman v. Pollei*, 153 M 406, 457 P 2d 776.

Personal Injuries Action

Suit for personal injuries filed by decedent prior to his death survived in favor of administratrix of his estate. *Pickett v. Kyger*, 151 M 87, 439 P 2d 57.

Wrongful Death Action

Where defendant's negligence caused a boat collision, injured decedent but not seriously enough to cause death, and knocked him into the water where he drowned, there must have been an appreciable time between the collision and death, so that decedent had a cause of action for his injuries which survived. *Stephens v. Brown*, — M —, 503 P 2d 667.

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife nor children and his father was dead. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

CHAPTER 29—PLACE OF TRIAL OF CIVIL ACTIONS

Section 93-2906. Place of trial may be changed in certain cases.

93-2908. Papers to be transmitted—costs and fees—jurisdiction.

93-2901. (9093) Certain actions to be tried where the subject, etc.

References

Beavers v. Rankin, 142 M 570, 385 P 2d 640; *Tassie v. Continental Oil Co.*,

228 F Supp 807, 808; *Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365.

93-2902. (9094) Other actions—where the cause, etc.

Governor

Complaint that governor's executive order establishing multi-county planning districts was inconsistent with legislative

resolution stated a cause of action arising in the county of the governor's official residence, and venue should have been changed to Lewis and Clark county.

Guildroy v. Anderson, 159 M 325, 497 P 2d 688.

References

Hidden Hollow Ranch v. Collins, 146 M 321, 406 P 2d 365.

93-2903. (9595) Place of trial of actions against counties.

Action by County against Nonresident

This section does not require a change of venue where a county brings action against a nonresident in the district court

of that county. Carter County v. Cambrian Corp., 143 M 193, 387 P 2d 904.

References

Tassie v. Continental Oil Co., 228 F Supp 807, 808.

93-2904. (9096) Other actions, according to the residence, etc.

Action on Contract and in Tort

In action in which complaint stated a claim for breach of contract and an interrelated and dependent claim in tort, the county of performance of the contract was the county in which any tort was committed for purpose of determining venue. Slovak v. Kentucky Fried Chicken, — M —, 518 P 2d 791.

Burden of Proof

In contract action, once defendant showed that his place of residence was other than where suit was brought, the burden of proof was on the plaintiff to meet the motion for change of venue. Rapp v. Graham, 145 M 371, 401 P 2d 579.

Change of Venue

Although express terms of construction loan agreement between borrowers residing in Lewis and Clark County and lender in Cascade County did not designate place of performance of the contract, district court of Lewis and Clark County properly denied motion of lender for change of venue of action for breach of the contract, where borrowers' affidavit in opposition to the motion showed that the contract was to be performed in Lewis and Clark County, the loan agreement, note and mortgage being executed in Lewis and Clark County for home to be built in that county and inspection, supervision and completion of the home were to take place in Lewis and Clark County where all bills were to be paid. Brown v. First Federal Savings & Loan Assn. of Great Falls, 144 M 149, 394 P 2d 1017, 1019.

Denial of defendant's motion for change of venue to place where he resided was improper, since, where plaintiff-relator did not plead the commission agreement itself, nor include it as an exhibit, there was no way of considering the venue matter except on the residence of the defendant. Rapp v. Graham, 145 M 371, 401 P 2d 579.

The provisions of this section are permissive only and where five separate

actions were brought in four widely separated counties against the same defendant involving the same accident, court did not abuse its discretion in granting change of venue under section 93-2906, subdivision 3, to the place where the tort occurred, for the convenience of the witnesses. Putro v. Mannix Electric, Inc., 147 M 314, 412 P 2d 410.

Under statute providing that on proper motion court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred and which was most convenient for defendants and their witnesses. Truck Ins. Exchange v. National Farmers Union Property & Cas. Co., 149 M 387, 427 P 2d 50.

Construction

Statutory provisions creating exceptions to the general rule recognizing a defendant's privilege to be sued in his own county will not be given a strained or doubtful construction. Rapp v. Graham, 145 M 371, 401 P 2d 579.

Foreign Corporations

A foreign corporation does not acquire residence for venue purposes in a particular county by appointing a resident of that county as its agent for service of process, and it may be sued in any county. Foley v. General Motors Corp., 159 M 469, 499 P 2d 774.

Performance of Contract

In an action for breach of an oral agreement to lease farm land, venue was in the county where the estate of one of the defendants was being probated, in which the other defendants resided, in which the land was located, and in which service was made and the creditor's claim filed. Erickson v. Toy, 142 M 121, 385 P 2d 268.

If contract is to be performed in a county other than the county of defendant's residence, then the plaintiff has his choice of the two counties in which to sue. He may sue in the county where defendant resides or in the county where the contract is to be performed. The provisions of this section are permissive. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

In order for plaintiff to maintain action on contract in a county where defendant does not reside, the place of performance must be evident either by express terms of contract, or by necessary implication that a county other than that of defendant's residence is intended to be the county of performance. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

To maintain suit in county other than that of defendant's residence, plaintiff must show clearly the facts relied on to bring the case within one of the exceptions to the rule. The contract must state clearly that it is to be performed in county other than that of defendant's residence so that no other fair construction can be placed upon it. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

In bringing suit where contract is to be performed, rather than place of defendant's residence, a mere direction by the seller as to the place of payment is not sufficient to maintain venue within exception to this section, nor can a promise to remit to cover the purchase price be sued upon by the seller in the county of the point to which the remittance is to be made. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

In suit against seller for breach of express warranty against diseased cattle, buyer properly exercised option in initiating suit in county where cattle were delivered as county where contract was to be performed. *Neely v. Steinbach*, 149 M 119, 423 P 2d 584.

Contract clause expressly requiring defendant to perform by making payments in county other than defendant's county of residence came within performance exception in statute thereby entitling plaintiff to institute action on contract in county in which payments were to be made. *McGregor v. Svare*, 151 M 520, 445 P 2d 571.

In action on account for grazing rentals on lands owned or controlled by plaintiff, trial court erred in granting motion for

change of venue where action was predicated upon contract to be performed in county where action was brought. *Cormier Bros., Inc. v. Willcutt*, 154 M 297, 462 P 2d 889.

"Place of performance" rule regarding venue in contract actions was inapplicable in action based on implied contract that did not specify place of payment; change of venue to county where defendants resided was proper. *Bick v. Haidle*, 156 M 350, 480 P 2d 818.

Where intent of parties was that contract would be performed in either Cascade or Chouteau County and contract was performed in Cascade County until breach, venue of action on contract was in Cascade County rather than county of defendant's residence. *Armon v. Stewart*, — M —, 511 P 2d 8.

Tort Actions

Attorney's advice to a client that a personal injury action had to be filed in the county where the cause arose was not improper or unethical. *Petition of Wasson*, 143 M 323, 389 P 2d 406.

Although either the county of residence of defendant or county where tort was committed was proper county in which to bring action for personal injury arising from accident, where none of the defendants were residents of Montana, the action was triable in any county designated by plaintiff in his complaint. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 809.

Defendant is not entitled to a change of venue in personal injury action where plaintiff filed the action in the proper county. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 809.

Where personal injury action arising from accident occurring in Fallon County, Montana, was commenced in Silver Bow County, Montana, by nonresident plaintiff, and nonresident defendants in removing action to federal district court designated Billings Division, but stated no statutory grounds for change of venue and did not show good cause for assignment to Billings Division, plaintiff was entitled to change of venue to Butte Division in which Silver Bow County was located. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 810.

References

Hidden Hollow Ranch v. Collins, 146 M 321, 406 P 2d 365; *Yeager v. Foster*, 146 M 330, 406 P 2d 370.

93-2906. (9098) Place of trial may be changed in certain cases. The court or judge must, on motion, change the place of trial in the following cases:

1. to 3. * * * [Same as parent volume.]

4. When the judge is disqualified from acting for any cause; but no change of the place of trial shall be made if:

(a) the parties agree in writing upon another district judge, or member of the bar as judge pro tempore, or

(b) any qualified district judge is called in, and within thirty (30) days after the motion is made, appears and assumes jurisdiction of the cause and of all matters and proceedings therein.

If the judge so appears he shall be vested with, and shall exercise, all the authority of the judge of the district in which the action or proceeding may be pending.

History: Ap. p. Sec. 21, Bannack Stat.; amd. Ch. 8, L. 3d Session 1866, which was set aside by Act of Congress of March 2, 1867; amd. Sec. 1, p. 68, L. 1867; amd. Sec. 27, p. 31, Cod. Stat. 1871; re-en Sec. 62, p. 53, L. 1877; re-en. Sec. 62, 1st Div. Rev. Stat. 1879; re-en. Sec. 62, 1st Div. Comp. Stat. 1887; amd. Sec. 615, C. Civ. Proc. 1895; en. Ch. 2, Ex. L. 1903; re-en. Sec. 6506, Rev. C. 1907; re-en. Sec. 9098, R. C. M. 1921; amd. Sec. 1, Ch. 6, L. 1973. Cal. C. Civ. Proc. Sec. 397.

Amendments

The 1973 amendment rewrote and rearranged the language of subdivision (4) for clarity, but without change in substance.

Change of Venue

Under statute providing that on proper motion the court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred and which was most convenient for defendants and their witnesses. *Truck Ins. Exchange v. National Farmers Union Property & Cas. Co.*, 149 M 387, 427 P 2d 50.

Convenience of Witnesses

Where affidavit showed that five separate actions had been brought against defendant in four widely separated counties involving the same occurrence, trial court properly granted change of venue for the convenience of the witnesses to the county where accident occurred although affidavit omitted names of witnesses and nature of their testimony. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

County Taxpayers as Jurors

Where county brought an action for damages done to bridge struck by defendant's truck, it was not an abuse of discretion for the district court to deny a motion for a change of venue even though the jury was made up, necessarily, of taxpayers of that county, each of whom had a pecuniary interest of \$31. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

Multiple Causes of Action

Where the defendant is entitled to a change of venue on one cause of action in a complaint containing more than one cause of action, the motion for change must be granted even though the other cause or causes would be triable where the plaintiff commenced the action. *Beavers v. Rankin*, 142 M 570, 385 P 2d 640.

Multiple Defendants

Even after dismissal from an action on tort arising outside the state of the only defendants residing in the county where the action was brought, the remaining defendants were not entitled to have the venue changed to the county of their residence so long as the plaintiff reasonably believed in good faith, when he brought the action, that he had a cause of action against the defendants resident in the county where brought. *Boucher v. Steffes*, — M —, 503 P 2d 659.

Time for Motion

Court's discretion in granting change of venue under subdivision 3 of this section cannot be exercised until after a defendant has answered, so that where action was brought under section 93-2904 in county where co-defendant lived, denial of first motion before defendant had answered applied only to the residency requirement of the co-defendant and did not bar determination of second motion made under this section after defendant had answered. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

References

Tassie v. Continental Oil Co., 228 F Supp 807, 810; State ex rel. Peery v. Dis-

trict Court, 145 M 287, 400 P 2d 648; Yeager v. Foster, 146 M 330, 406 P 2d 370.

93-2908. (9100) Papers to be transmitted—costs and fees—jurisdiction. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleading and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made, except that: (1) when the action is an action upon a contract, express or implied, for the direct payment of money, and no claim contained in the complaint exceeds one thousand dollars (\$1,000); (2) the county designated in the complaint is not the proper county; and (3) if the plaintiff will not within ten (10) days after request stipulate for change of venue and defendant files a motion for such change and such motion is thereafter granted; then the party filing the complaint must pay all costs and fees of filing the papers anew and all costs and fees, including reasonable attorney's fees to be fixed by the court incurred by the defendant by reason of the change of venue motion and hearing. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R. C. M. 1921; amd. Sec. 1, Ch. 176, L. 1971. Cal. C. Civ. Proc. Sec. 399.

Amendments

The 1971 amendment added to the second sentence the language requiring payment of costs and fees by the party filing the complaint in the instances described in the numbered clauses.

CHAPTER 30—MANNER OF COMMENCING CIVIL ACTIONS—SERVICE OF SUMMONS

93-3002. (9106) Superseded—Supreme Court Order 10750.

Supersession

This section (Sec. 23, p. 47, Bannack Stat.; Sec. 23, p. 139, L. 1867; Sec. 67, p. 54, L. 1877), relating to endorsement

of the complaint and issue of summons, is superseded by M. R. Civ. P., Rule 41(e) as amended by Sup. Ct. Ord. 10750.

93-3008. (9112) Superseded—Supreme Court Order 10750.

Supersession

This section (Sec. 1, Ch. 37, L. 1917; Sec. 1, Ch. 135, L. 1949; Sec. 1, Ch. 122, L. 1951), relating to service of process

on corporations through the secretary of state, is superseded by M. R. Civ. P., Rule 4 D, as amended by Sup. Ct. Ord. 10750.

93-3011, 93-3012. (9115, 9116) Superseded—Supreme Court Order 10750.

Supersession

These sections (Secs. 4, 5, Ch. 37, L. 1917), relating to service of process on corporations through the secretary of

state, are superseded by M. R. Civ. P., Rule 4 D, as amended by Sup. Ct. Ord. 10750.

93-3020. (9124) Return of summons.**References**

Sewell v. Beatrice Foods Co., 145 M 337, 400 P 2d 892.

CHAPTER 37—VERIFICATION OF PLEADINGS**93-3702. (9163) Verification of pleadings.****References**

Rambur v. Diehl Lumber Co., 144 M 84, 394 P 2d 745, 747.

CHAPTER 41—CLAIM AND DELIVERY OF PERSONAL PROPERTY**93-4104. (9223) Undertaking and duty of sheriff.****Constitutionality**

Replevin provisions which authorized state agents to seize property in possession of another person upon application of claimant and subsequent posting of bond prior to a hearing to determine parties' rights to possession are invalid as they work a deprivation of property without due process of law by denying an opportunity to be heard before chattels are taken from the possessor. *Fuentes v.*

Shevin, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983; distinguished in 348 F Supp 1004, 1020; 350 F Supp 1310, 1312; 351 F Supp 118, 120; 356 F Supp 595, 600; 356 F Supp 1163, 1164; 360 F Supp 203, 204; 361 F Supp 1187, 1192; 362 F Supp 374, 376; 481 F 2d 615, 616; explained in 350 F Supp 240, 242; 354 F Supp 203, 204; 356 F Supp 407, 413; 357 F Supp 3, 6; 362 F Supp 1373, 1383.

CHAPTER 42—INJUNCTION

Section 93-4215. Injunction against price fixing.

93-4216. Injunction may issue without bond.

93-4203. (9242) Injunction—when not allowed.**Discretionary Appointment**

Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by board of railway commissioners in the proper exercise of their discretion. *Steel v. Board of Railroad Commrs.*, 144 M 432, 397 P 2d 101.

Enforcement of Public Statute

County commissioners and assessor cannot be enjoined from relying on re-

classification officer's real property evaluations to determine tax assessment rolls. *State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405, 19 ALR 3d 396.

District court acted beyond its jurisdiction by issuing injunction to prevent board of equalization from revising grading and valuation of nonirrigated farm land pursuant to section 84-429.7 et seq. *State ex rel. Lord v. District Court*, 154 M 269, 463 P 2d 323.

93-4204. (9343) Injunction order—when granted.**Real Estate Cases**

An order enjoining landowner from proceeding with mobile home subdivision on his land until zoning regulations were adopted was improper because it was

impossible to predict whether landowner's plans would conflict with zoning regulations finally adopted. *State ex rel. Corning v. District Court of 18th Judicial District*, 156 M 81, 474 P 2d 701.

93-4205. (9244) Injunction order, etc.**Injunction Granted after Hearing**

Portion of statute pertaining to affidavits does not apply to injunction issued on basis of hearing on order to show cause.

State ex rel. Martin v. District Court, Twelfth Judicial Dist., 151 M 41, 438 P 2d 563.

93-4206. (9245) When notice required.**References**

State ex rel. Keast v. Krieg, 145 M 521,
402 P 2d 405.

93-4215. (9254) Injunction against price fixing. Whenever any action, either civil or criminal, shall have been instituted in court in this state against any person or persons, corporation or corporations, foreign or domestic, for price fixing or regulating the production of any article of commerce or of the product of the soil, for consumption by the people, the court in which such action is pending, if it be a court of record, or if not, then any court of record in this state, shall be and it is hereby authorized to issue an injunction to restrain any such person or persons, corporation or corporations, foreign or domestic, from doing business in this state pending the final determination of said action so instituted.

History: En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R. C. M. 1921; amd. Sec. 56, Ch. 100, L. 1973.

Amendments

The 1973 amendment substituted "for price fixing or regulating the production of any article of commerce or of the product of the soil, for consumption by the people" for "for the purpose of en-

forcing the provisions of section 20 of article XV of the constitution of the state of Montana, or any law or laws enacted pursuant to or for carrying out the same"; and deleted "in violation of said section of the constitution, or in violation of any law or laws enacted pursuant to or for the purpose of enforcing said section of the constitution" after "doing business in this state" near the end of the section.

93-4216. (9255) Injunction may issue without bond. Said injunction shall issue as in cases of equity, without bond, upon the application of the county attorney of the county in which such action is pending, or upon the application of the attorney general, in the name of the state of Montana, upon a prima facie showing that an action, civil or criminal, has been so instituted and is so pending, charging such person or persons, corporation or corporations, foreign or domestic, with such violation.

History: En. Sec. 2, Ch. 93, L. 1905; re-en. Sec. 6655, Rev. C. 1907; re-en. Sec. 9255, R. C. M. 1921; amd. Sec. 57, Ch. 100, L. 1973.

tution, or of any law or laws enacted thereunder."

Amendments

The 1973 amendment substituted "such violation" at the end of the section for "a violation of said section of the consti-

Repealing Clause

Section 58 of Ch. 100, Laws 1973 read "Sections 3-101.1, 4-348, 16-405, 16-2407, 23-2701.1, 41-1609, 75-6410.1, 84-211 and 84-707, R. C. M. 1947, are repealed."

CHAPTER 43—ATTACHMENT**Section 93-4304. Undertaking.**

93-4331.1. Release of attachment by clerk where no proceedings taken in main action.

93-4304. (9259) Undertaking. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, with two (2) or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars (\$1,000) or under, or, in case the amount so claimed

by plaintiff shall exceed one thousand dollars (\$1,000), then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of twenty thousand dollars (\$20,000). The condition of such undertaking shall be to the effect that if the defendant recovered judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking. At any time within thirty (30) days after the service of summons, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two (2) days nor more than ten (10) days, must justify before a judge of the district court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

History: Ap. p. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C.

1907; re-en. Sec. 9259, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967. Cal. C. Civ. Proc. Sec. 539.

Amendments

The 1967 amendment increased the maximum amount of an undertaking from \$10,000 to \$20,000.

93-4314. (9267) Garnishment—when garnishee liable to plaintiff.

References

Great Falls Transfer & Storage Co. v.

Pan American Petroleum Corp., 353 F 2d 348.

93-4331.1. Release of attachment by clerk where no proceedings taken in main action. If a writ of attachment has been levied on real property as provided in section 93-4307, R. C. M. 1947, and no proceedings have been taken in the action in which the attachment was issued for a period of five years, the clerk of court shall upon application of the defendant or the record owner of such real property issue a release of the attachment and a copy of such release shall be filed with the county clerk where the writ of attachment and notice thereof is filed and the county clerk shall file and index such release as any other releases of attachment.

History: En. Sec. 1, Ch. 97, L. 1965.

Title of Act

An act providing that a lien of attach-

ment on real property may be released by the clerk of court where no action has been taken to foreclose such lien for a period of five years.

93-4335. (9288) Different attachments—when liens accrue.

Conflicting Attachments

Since, for purposes of garnishment, a debt has no fixed situs but may be reached in any jurisdiction where the person found owing it can be located, Wyoming court was bound to give full faith and credit to Montana court in de-

termining which garnishor had prior claim where writs of attachment had been issued by different parties on the same garnishee in both states. Great Falls Transfer & Storage Co. v. Pan American Petroleum Corp., 353 F 2d 348.

93-4342. (9295) Repealed.**Repeal**

This section (Sec. 9295, R. C. M. 1921), relating to attachment of stocks of foreign

corporations, was repealed by Sec. 143, Ch. 300, Laws 1967.

CHAPTER 44—RECEIVERS**Section 93-4401. Appointment of receiver.**

93-4401. (9301) Appointment of receiver. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. to 4. * * * [Same as parent volume.]

5. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

History: Ap. p. Sec. 116, p. 67, *Bannack Stat.*; re-en. Sec. 143, p. 160, L. 1867; re-en. Sec. 179, p. 62, *Cod. Stat.* 1871; en. Sec. 221, p. 93, L. 1877; re-en. Sec. 221, 1st Div. Rev. Stat. 1879; re-en. Sec. 229, 1st Div. Comp. Stat. 1887; re-en. Sec. 950, C. Civ. Proc. 1895; re-en. Sec. 6698, Rev. C. 1907; re-en. Sec. 9301, R. C. M. 1921; amd. Sec. 142, Ch. 300, L. 1967. Cal. C. Civ. Proc. Sec. 564.

appointment of receiver at instance of bank merely to protect the price of the stock was erroneous. *State ex rel. Larry C. Iverson, Inc. v. District Court*, 146 M 362, 406 P 2d 828.

Extraordinary Remedy

Appointment of a receiver being a "drastic" remedy, which deprives the lawful owner of property the right to manage and control his own interests, the power to appoint a receiver should be exercised sparingly only upon a strong showing, and not as of course. If the desired outcome may be achieved in any other way, then this course should be followed. *State ex rel. Larry C. Iverson, Inc. v. District Court*, 146 M 362, 406 P 2d 828.

References

Thisted v. Tower Management Corp., 147 M 1, 409 P 2d 813.

Amendments

The 1967 amendment deleted subdivision 5 and redesignated former subdivision 6 as subdivision 5.

Debt as Basis for Appointment

Where bank held stock as security on loans made by farming corporation, but it appeared that stockholders were, in good faith, planning to meet their obligation and the corporation was solvent,

93-4406. (9306) Powers of receivers.**References**

Thisted v. Tower Management Corp., 147 M 1, 409 P 2d 813.

CHAPTER 49—ISSUES—MODE OF TRIAL AND POSTPONEMENT—PROCEDURE TO PROCURE JURY TRIAL**93-4910. (9332) Motion to postpone a trial, etc.****Criminal Cases**

Court did not commit prejudicial error when it overruled criminal defendant's objection to county attorney's motion for continuance even though motion was not

supported by required affidavit where motion was made just prior to end of trial court's day and trial resumed promptly on next morning. *State v. Crockett*, 148 M 402, 421 P 2d 722.

CHAPTER 50—TRIAL BY JURY—FORMATION OF JURY—CHALLENGES

Section 93-5010. Challenge.

93-5008. (9341) Ballots—when drawn from box No. 3.

Compiler's Notes

Section 93-1506 referred to in the first

sentence, was repealed by Sec. 4, Ch. 110, Laws of 1969.

93-5010. (9343) **Challenge.** Each party may challenge the jury or jurors as follows:

1. to 3. * * * [Same as parent volume.]

There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties. A challenge to the array or panel may be made and the whole array or panel set aside by the court, when the jury was not selected, drawn, summoned or notified as prescribed by law. Challenges to individual jurors are for cause or peremptory. Each party is entitled to four peremptory challenges, except as provided for under section 93-1205. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

History: Ap. p. Sec. 133, p. 69, Ban-nack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R. C. M.

1921; amd. Sec. 1, Ch. 300, L. 1971. Cal. C. Civ. Proc. Sec. 301.

Amendments

The 1971 amendment added the exception to the fourth sentence of the second paragraph; and made a minor change in punctuation.

93-5011. (9344) **Challenges for cause.****Taxpayers of Plaintiff County**

Where county brought an action for damages to bridge, it was not an abuse of discretion for the district court to deny a motion for a change of venue even though

the jury was necessarily made up of taxpayers of that county each of whom had a pecuniary interest averaging \$31. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

CHAPTER 51—TRIAL—CONDUCT OF THE TRIAL

93-5101. (9349) **Order of trial.****Instructions to jury**

Plaintiff gave implied consent and waived objection by actively participating without objection in proceedings wherein trial court gave oral answer to question asked by the jury and orally confirmed the correctness of other instructions orally

stated by counsel. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

References

Boehler v. Sanders, 146 M 158, 404 P 2d 885.

93-5102. (9350) **View by jury of the premises.****Discretion of Trial Court**

A viewing is within the discretion of the trial court, even where there has been a change in the condition of the scene of the accident or the thing which contributed to the accident. *Clark v. Worrall*, 146 M 374, 406 P 2d 822.

Time of Viewing

Where alterations to defendant's bowling alley had little relationship to the cause of the accident, it was not an abuse of discretion to allow the jury to view the premises on which the accident occurred after the alterations had been

made. *Clark v. Worrall*, 146 M 374, 406 P 2d 822.

References

Wolfe v. Northern Pacific R. Co., 147 M 29, 409 P 2d 528.

93-5104. (9352) Jury may take with them certain papers.

Subsequent Request by Jury

Trial court did not err in permitting state's exhibits, consisting of photographs of scene of accident, to be taken to jury

room when asked for by jury about one hour after it began deliberation. *State v. Medicine Bull*, 152 M 34, 445 P 2d 916.

93-5105. (9353) Deliberation of jury—how conducted.

Misconduct of Jury

When the jury retires to the jury room it should be concerned only with the evidence and the law; the verdict, thus, is a result of a fair expression of opinion by all the jurors. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of jury during its

deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

93-5106. (9354) May come into court for further instructions.

Brought into Court

Although this section provides that the jury may request that they be brought into court, this is not mandatory and the jury may send an inquiry out to the court. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 498.

Oral Instructions

Plaintiff gave implied consent and

waived objection by failure to object and by active participation in proceedings wherein trial court, without the presence of a stenographer, gave oral answer to question asked by the jury and orally confirmed the correctness of other instructions orally requested by counsel. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

93-5110. (9358) Verdict—how declared—form of—polling the jury.

Poll of Jury

Court abused discretion in granting new trial based solely on ground that it had erred in refusing to grant request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that, in response

to question by judge, foreman of jury advised him they had agreed upon verdict and that, following reading of verdict, judge inquired if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

CHAPTER 52—THE VERDICT—GENERAL AND SPECIAL—DIRECTED WHEN

93-5205. (9364) Directed verdict—when.

Evidence Supporting Directed Verdict

Denial of motion for directed verdict by lessor of destroyed building being sued by lessee claiming that premises were repairable was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building was de-

stroyed. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

In negligence suit, defendant was entitled to directed verdict where only evidence attempting to establish proximate causal connection between breach of duty and plaintiff's injuries and damages were reports of persons not present at trial, which were private documents and not part of a case file of attending physi-

cians. *Pickett v. Kyger*, 151 M 87, 439 P 2d 57, distinguished in 157 M 277, 285, 485 P 2d 54.

Inferences from Evidence

In passing on a motion for a directed verdict the court will consider the evidence in the light most favorable to the party against whom the motion is directed and will draw every reasonable inference from such evidence. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

Insufficient Evidence

A directed verdict may be granted when the evidence is so insufficient in fact as to be insufficient in law. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

Motion by Both Parties

Owner of building destroyed by gas explosion was entitled to directed verdict against general contractor who was clearly liable on evidence, but not against gas company who should have been granted its motion for directed verdict on record unequivocally demonstrating that gas company took every reasonable precaution to protect customers as required by law. *Bridges v. Moritz*, 149 M 273, 425 P 2d 721.

Negligence

Directed verdict on liability of defendant for injuries sustained by plaintiff, when defendant's car struck mare which was being led by rope attached to saddle on gelding upon which plaintiff was riding, was proper where negligence of defendant was shown by evidence that defendant had been drinking; that he was driving the car at 30-35 mph while passengers were hunting gophers beside the road; that defendant was not aware of

the mare which he struck until the collision was inevitable; and that he failed to stop after realizing that he had struck horse in violation of section 32-1202. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 864.

Questions of Fact

A jury question is presented only when reasonable men might differ as to the conclusions of fact to be drawn from the evidence, viewed in the light most favorable to the party against whom the motion is made. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

Directed verdict upholding contested will was improper where, under the evidence, reasonable and fair-minded men might have reached the conclusion that the will was invalid due to fraud, undue influence or lack of testamentary capacity. *Estate of Hall v. Milkovich*, 158 M 438, 492 P 2d 1388.

Review of Order Directing Verdict

In reviewing an order directing a verdict for the defendant, the supreme court would consider only the evidence of the plaintiff, excluding a bare scintilla but including every fair inference which might be drawn from the facts proved, as well as any evidence introduced by defendant which tended to support the plaintiff's case, and if the evidence viewed in the most favorable light tended to establish the case made by plaintiff's pleadings, the order would be reversed. *McIntosh v. Linder-Kind Lumber Co.*, 144 M 1, 393 P 2d 782.

References

Holland v. Konda, 142 M 536, 385 P 2d 272; *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

CHAPTER 53—TRIAL BY THE COURT

93-5302. (9366) Superseded—Supreme Court Order 10750-9.

Supersession

Section 93-5302 (Sec. 1111, C. Civ. Proc. 1895), requiring decision on findings upon question of fact to be in writing and filed

within twenty days after submission, was superseded by M. R. Civ. P., Rule 52(a), as amended by Sup. Ct. Ord. 10750-9.

93-5305 to 93-5307. (9369 to 9371) 10750-9.

Supersession

Sections 93-5305 to 93-5307 (Secs. 1114 to 1116, C. Civ. Proc. 1895), relating to exceptions for defective findings and to

Superseded—Supreme Court Order

effect of want of findings, were superseded by M. R. Civ. P., Rule 52(b), as amended by Sup. Ct. Ord. 10750-9.

CHAPTER 55—EXCEPTIONS—SETTLEMENT AND ALLOWANCE OF BILL

93-5501. (9386) Superseded—M. R. App. Civ. P.

Supersession

This section (Ap. p. Sec. 164, p. 75, Bannack Stat.), defining an exception and providing the time when the exception

must be taken, is listed as superseded in Table A of M. R. App. Civ. P. See M. R. Civ. P., Rule 46.

93-5503. (9388) Superseded—M. R. App. Civ. P.

Supersession

This section (Ap. p. Sec. 166, p. 76, Bannack Stat.; Sec. 1, Ch. 92, L. 1905; Sec. 2, Ch. 225, L. 1921), relating to ex-

ceptions and objections, is listed as superseded in Table A of M. R. App. Civ. P. See M. R. Civ. P., Rule 46.

93-5504 to 93-5509. (9389 to 9394) Superseded—M. R. App. Civ. P., Rules 9, 10 and 25.

Supersession

These sections (Secs. 1154 to 1158, C. Civ. Proc. 1895; Sec. 1, Ch. 35, L. 1907; Secs. 3, 4, Ch. 225, L. 1921; Sec. 1, Ch.

19, L. 1941; Sec. 1, Ch. 85, L. 1955), relating to the settlement and allowance of bill of exceptions, are superseded by M. R. App. Civ. P., Rules 9, 10 and 25.

CHAPTER 56—NEW TRIALS—GROUNDS AND MOTIONS FOR—
RECORD ON APPEAL FROM FINAL JUDGMENT

93-5601. (9395) New trial defined.

Parties Restored to Original Position

The granting of a motion for a new trial restores the parties to the positions they occupied before the trial and the action is commenced anew with the par-

ties limited to their original pleadings but unbound by previous evidence and testimony except as held by existing rules of evidence. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

93-5602. (9396) New trial in equity cases.

Irregularity in Proceedings

In an action for specific performance where plaintiff who had no knowledge of law or procedure acted as his own counsel and, though he received some assistance from the trial judge, many errors in

the proceedings were shown in the record, it was within the discretion of the judge to grant defendant's motion for a new trial. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

93-5603. (9397) When a new trial may be granted.

Abuse of Discretion

Aggrieved party has burden of proving that district court manifestly abused its discretion by granting new trial; prima facie case of manifest abuse of discretion may be made by discrediting grounds specified for granting new trial or showing that existing error did not materially affect substantial rights of moving party. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

Where jury's verdict was based on conflicting and probably false testimony, refusal of new trial by trial court was sufficient abuse of discretion to require supreme court to reverse lower court and order new trial. *Morris v. Corcoran Pulpwood Co.*, 154 M 468, 465 P 2d 827.

Accident or Surprise.

Introduction in midtrial in negligence action against county for death of exhibitor's horses in barn fire of evidence tending to show that care, custody and control of horses was in county was not surprise creating ground for new trial because of county's representation by insurers' counsel where county had been warned by insurer almost two and a half years before trial that policy might not cover loss because of policy exclusion of property in care, custody and control of the insured; refusal to admit into evidence county's premium book containing rules and regulations applicable to exhibitors as well as exculpatory disclaimers of liability for loss of exhibitor's live-

stock did not create surprise. Haynes v. County of Missoula, — M —, 517 P 2d 370.

Appellate Review

In condemnation proceeding, where state appraised land at \$18,000, condemnee appraised it at \$95,000 and jury awarded condemnee \$21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of fact that there was no rebuttal of state's only expert witness. State Highway Commission v. Greenfield, 145 M 164, 399 P 2d 989.

Inadequate Damages

The trial court had no power in a condemnation case to condition its denial of a new trial on acceptance by the highway commission of a higher award. State Highway Commission v. Schmidt, 143 M 505, 391 P 2d 692.

Court abused its discretion in granting new trial upon grounds of insufficiency of evidence to justify verdict in that "verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car driven by man who had several drinks. Heen v. Tiddy, 151 M 265, 442 P 2d 434.

Granting of new trial on ground that award of \$4,000 was inadequate damages for death of high school sophomore whose funeral expenses were \$1,605 was an abuse of discretion under the circumstances, including fact that plaintiff father received no earnings from son and gave no indication of need. Davis v. Smith, 152 M 170, 448 P 2d 133.

Instructions to Jury

Long form quotient verdict instruction from Jury Instruction Guide is not "a resort to the determination of chance" within meaning of statute in absence of showing that jurors agreed in advance that quotient thus obtained should constitute amount of verdict and adhered to that agreement. Thomas v. Whiteside, 148 M 394, 421 P 2d 449.

Where trial court erred in its instruction on assumption of risk in pedestrian injury case, trial court did not abuse its discretion by granting new trial pursuant to this section. Jankovich v. Neill, 153 M 337, 457 P 2d 475.

Jury Misconduct

In a condemnation proceeding, affidavits from jurors showing that a news-

paper cartoon having to do with condemnation cases in general had been viewed by some members of the jury during the trial could not be used to support the motion for a new trial in the absence of a showing that the verdict was reached in a manner other than by a fair expression of opinion by the jurors. State Highway Commission v. Manry, 143 M 382, 390 P 2d 97, distinguished in Goff v. Kinzle, 148 M 61, 417 P 2d 105, and in Rasmussen v. Sibert, 153 M 286, 456 P 2d 835.

New trial was properly granted where foreman of jury made his own investigation at the scene of the accident after hearing testimony and informed the other members of jury, during their deliberation, of the results of his investigation. The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. Goff v. Kinzle, 148 M 61, 417 P 2d 105, distinguished in Rasmussen v. Sibert, 153 M 286, 456 P 2d 835.

Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of the jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. Schmoyer v. Bourdeau, 148 M 340, 420 P 2d 316, 317.

Trial court's granting of new trial on grounds of jury misconduct was reversible error where such motion was made under subd. 1 of this section and supported by jury affidavits, since use of jury affidavits under this section is confined to motions made under subd. 2. Rasmussen v. Sibert, 153 M 286, 456 P 2d 835.

Polling Jury

Court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict and that following reading of verdict, signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. Martello v. Darlow, 151 M 232, 441 P 2d 175.

Substantial Evidence

Although new trial for insufficiency of evidence is discretionary with trial court and will not be disturbed except for abuse,

the discretion is exhausted when court finds substantial evidence to support verdict; evidence from which it could be found that drive-in restaurant owner had no reasonable cause to anticipate "spur of the moment" unprovoked assault upon patron supported verdict for owner in action for injuries, so that granting of new trial was abuse of discretion. *Kincheloe v. Rygg*, 152 M 187, 448 P 2d 140.

Verdict of \$30,000 for compensation for land taken in condemnation action was supported by substantial evidence where

two appraisers had valued the land at \$19,650 and \$22,873 respectively, plaintiff's expert valued the land at \$64,000 and plaintiff testified that his compensation should be \$78,000; trial court erred in granting new trial on ground that evidence was insufficient to justify the verdict. *State Highway Comm. v. Arms*, — M —, 518 P 2d 35.

References

Waite v. Waite, 143 M 248, 389 P 2d 181.

93-5606. (9400) Superseded—Supreme Court Order 10750-9.

Supersession

Section 93-5606 (Sec. 172, p. 77, *Bannack Stat.*; Sec. 3, Ch. 41, L. 1907; Sec. 8, Ch. 225, L. 1921), relating to hearing on new

trial motion, was superseded by M. R. Civ. P., Rule 59(d), as amended by Sup. Ct. Ord. 10750-9.

93-5607, 93-5608. (9401, 9402) Superseded—M. R. App. Civ. P., Rules 7, 9, 10 and 25.

Supersession

These sections (Ap. p. Sec. 289, p. 115, L. 1877; Ap. p. Secs. 1175, 1176, C. Civ. Proc. 1895; Sec. 4, Ch. 41, L. 1907; Sec. 9, Ch. 225, L. 1921), relating to a stay

of proceedings on notice of motion for a new trial and contents of record on appeal, are superseded by M. R. App. Civ. P., Rules 7, 9, 10 and 25.

CHAPTER 57—JUDGMENT—MANNER OF GIVING AND ENTRY— JUDGMENT ROLL AND DOCKET—LIEN OF

Section 93-5708. Judgment lien—when it begins and when it expires.

93-5710.1. Judgment or decree recorded before 1965 as notice of contents—certified copies as evidence.

93-5710.2. Judgment or decree recorded before 1967 as notice of contents—certified copies as evidence.

93-5710.3. Validation of defective judgments or decrees affecting realty—1969 act.

93-5710.4. Validation of defective judgments or decrees affecting realty—1971 act.

93-5710.5. Validation of defective judgments or decrees affecting realty—1973 act.

93-5702. (9404) Superseded—M. R. App. Civ. P., Rule 29.

Supersession

This section (Sec. 174, p. 77, *Bannack Stat.*), providing for bringing of a case before the court for argument where the

case has been reserved for argument, is superseded by M. R. App. Civ. P., Rule 29.

93-5707. (9409) Superseded—M. R. App. Civ. P., Rules 9, 10 and 25.

Supersession

This section (Ap. p. Sec. 203, p. 174, L. 1867; Sec. 1, Ch. 36, L. 1921; Sec. 1, Ch. 146, L. 1925), relating to the contents

and filing of judgment roll, is superseded by M. R. App. Civ. P., Rules 9, 10 and 25.

93-5708. (9410) Judgment lien—when it begins and when it expires. Immediately after the entry of the judgment in the judgment book, the

clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied.

History: Ap. p. Sec. 180, p. 78, Bannack Stat.; en. Sec. 204, p. 174, L. 1867; re-en. Sec. 244, p. 77, Cod. Stat. 1871; amd. Sec. 1, p. 40, L. 1876; re-en. Sec. 295, p. 116, L. 1877; re-en. Sec. 295, 1st Div. Rev. Stat. 1879; re-en. Sec. 307, 1st Div. Comp. Stat. 1887; re-en. Sec. 1197, C. Civ. Proc. 1895; re-en. Sec. 6807, Rev. C. 1907; re-en. Sec. 9410, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 671.

Advisory Committee's Note

Subdivision (b) of Rule 41, M. R. App. Civ. P., eliminates the reference in section 93-5708 to judgment rolls, which are nowhere provided for in Montana Rules of Appellate Civil Procedure.

Amendments

The 1965 amendment substituted "the entry of the judgment in the judgment book" for "after filing the judgment roll" near the beginning of the section.

93-5710.1. Judgment or decree recorded before 1965 as notice of contents—certified copies as evidence. Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 124, L. 1965.

Title of Act

An act to validate records of court proceedings containing defects, omissions, informalities or irregularities in obtaining a judgment or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may

be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered; and providing for a repealing clause.

Repealing Clause

Section 2 of Ch. 124, Laws 1965 repealed all acts and parts of acts in conflict therewith.

93-5710.2. Judgment or decree recorded before 1967 as notice of contents—certified copies as evidence. Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1967, copied into the proper book, kept in the office of the clerk of the

district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 184, L. 1967.

Title of Act

An act to validate records of court proceedings prior to January 1, 1967, containing defects, omissions, informalities or irregularities in obtaining a judgment

or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

93-5710.3. Validation of defective judgments or decrees affecting realty—1969 act. Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1969, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 73, L. 1969.

Compiler's Notes

This act became effective July 1, 1969.

Title of Act

An act to validate records of court proceedings prior to January 1, 1969, containing defects, omissions, informalities or ir-

regularities in obtaining a judgment or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

93-5710.4. Validation of defective judgments or decrees affecting realty—1971 act. Any judgment or decree of any court of this state

affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1971, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 94, L. 1971.

Title of Act.

An act to validate records of court proceedings prior to January 1, 1971, containing defects, omissions, informalities or irregularities in obtaining a judgment or

decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

93-5710.5. Validation of defective judgments or decrees affecting realty—1973 act. Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1973, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 146, L. 1973.

Title of Act

An act to validate records of court proceedings prior to January 1, 1973, containing defects, omissions, informalities or irregularities in obtaining a judgment or

decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

CHAPTER 58—THE EXECUTION

- Section 93-5813.1. Waiver of exemptions prohibited in unsecured note.
 93-5846. Validation of judicial sales before 1973.

93-5813.1. Waiver of exemptions prohibited in unsecured note. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

History: En. Sec. 1, Ch. 172, L. 1965.

Title of Act

An act to prohibit waiver of statutory exemptions.

- 93-5816. (9429) Exemption of earnings—debts incurred for necessities.**

Waiver of Exemption

General waiver of statutory exemption in secured promissory note was not enforceable as against divorcee working to provide the necessities for herself and her

children; a levy of execution could not be had on her wages. *Anaconda Federal Credit Union, #4401 v. West*, 157 M 175, 483 P 2d 909.

- 93-5824. (9432) Notice of sale—how given—copy of notice.**

Sale of Real Property

District court ordering the restraining of a sale of real property on execution can determine if additional notice is required after the injunction is lifted if

the initial notice requirements of this section have been met. *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 95.

- 93-5841. (9449) Possession of lands prior to foreclosure, etc.**

Vendee of Mortgagee

Purchasers who took premises subject to pre-existing mortgage, and who had not assumed payment of mortgage, even though occupying premises as their home at time of foreclosure, were not "execu-

tion debtors" within meaning of statute and were not entitled to possession of premises during one-year period of redemption. *First Nat. Bank of Circle v. Hastetter*, 149 M 142, 423 P 2d 306.

93-5846. Validation of judicial sales before 1973. All judicial sales of real property prior to January 1, 1973, provided no action is now pending to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale, and when no such deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, or the manner of making or conducting the sale, or in the recitals or references in such deed, shall be disregarded and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 80, L. 1973.

Compiler's Notes

Except for the date in the second line of text, the above section is identical with Sec. 1, Ch. 57, Laws of 1965, Sec. 1, Ch. 180, Laws of 1967, Sec. 1, Ch. 76, Laws of 1969 and Sec. 1, Ch. 97, Laws of 1971, pre-

viously compiled at this section. The compiler has therefore substituted the above section for the 1971 section.

Title of Act

An act relating to validation of judicial sales prior to January 1, 1973, of real property and curing defects or irregu-

larities in the issuance of execution, manner of making or conducting the sale, or in the recitals or references in sheriffs' deeds.

CHAPTER 60—FORECLOSURE OF MORTGAGES—ACTIONS FOR—SALES UNDER POWERS

93-6001. (9467) Proceedings in foreclosure suits.

Deficiency Judgment

The purpose of this section is to require the mortgagee to bring one foreclosure action to enforce "any right" protected by the mortgage. If the price bid in at foreclosure is insufficient to reimburse the mortgagee, a deficiency judgment may be entered against the mortgagor for the balance due and may be enforced by a lien upon the real property of the mortgagor only. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 482.

certificates, mortgagee foreclosed the mortgage, the foreclosure sale cut off any lien asserted by mortgagee for taxes paid although the mortgage permitted mortgagee to pay taxes and collect the same upon foreclosure. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

A mortgagee who pays taxes on the mortgaged property prior to foreclosure does not acquire a distinct and separate lien on the property which survives the foreclosure sale. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

Tax Lien

Where, subsequent to purchase of tax

CHAPTER 61—NUISANCE, WASTE AND TRESPASS ON REAL PROPERTY—ACTIONS FOR

93-6101. (9474) Nuisance defined and actions for.

Baseball Park

"Pee wee" baseball league conducted on empty lot in residential district was not nuisance under statute, notwithstanding evidence that: field was brightly illuminated, crowds were noisy, traffic was heavy, field was dusty, some children used foul language, balls were hit into neighboring yards damaging lawns and flowers

and games were played after 10 p.m.; nuisance, if any, was private and arose out of particular manner of operation of legitimate enterprise lower court should merely have entered decree calculated to eliminate injurious features. *Kasala v. Kalispell Pee Wee Baseball League*, 151 M 109, 439 P 2d 65, 32 ALR 3d 1120.

CHAPTER 62—QUIETING TITLE TO PROPERTY, REAL AND PERSONAL AND OTHER ACTIONS CONCERNING REAL ESTATE

93-6216. (9492) An order may be made to allow a party to survey, etc.

References

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

93-6218. (9494) Petition for order—procedure.

References

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

CHAPTER 63—PARTITION OF REAL ESTATE—ACTIONS FOR

93-6301. (9516) Who may bring actions for partition.

Separate Owners of Land and Building

Where land and building on land had separate owners, owner of building had no right to an order that the land and building be sold together and the proceeds

apportioned between the owners, because the owners were not cotenants of the whole property but sole owners of parts of the property. *Allman v. Stuart*, 158 M 402, 492 P 2d 909.

93-6311. (9526) Title of parties may be tried.**Compiler's Notes**

Sections 93-3101 to 93-3103, 93-3201 to 93-3203, 93-3301 to 93-3306, 93-3401, 93-3402, 93-3404, 93-3405, 93-3408, 93-3410 to 93-3412, 93-3415, 93-3501 to 93-3506, 93-3601 to 93-3604, 93-3701, 93-3801 to 93-3803, 93-

3806 to 93-3808, 93-3811 to 93-3813, 93-3815 to 93-3820, 93-3901 to 93-3905, 93-3907, and 93-3909, contained in the reference to sections 93-3101 to 93-3910 in this section in the parent volume, were repealed by Sec. 84, Ch. 13, Laws 1961.

CHAPTER 64—QUO WARRANTO**93-6405. (9580) When private person may commence action.****Unqualified Appointee**

Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by board

of railway commissioners in proper exercise of their discretion, *Steel v. Board of Railroad Commrs.*, 144 M 432, 397 P 2d 101.

CHAPTER 66—JUSTICES' COURTS—PLACE OF TRIAL OF ACTIONS

Section 93-6601. Where actions must be commenced.

93-6602. Place of trial may be changed in certain cases.

93-6601. (9619) Where actions must be commenced. Actions in justices' courts may be commenced, and, subject to the right to change the place of trial, as in this chapter provided, may be tried:

1. When the defendant, or all the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for the recovery of personal property, or the value thereof, or damages for taking or detaining the same; in the county in which the property, or any part thereof, may be found, or in which the property, or any part thereof, was taken, or in which the defendant or either of the defendants reside;

2. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for damages for violation of an express or implied contract, or for money due on an express or implied contract, debt, note, or account; in the county in which such contract or obligation is to be or was to have been performed, or such money is to be or was to have been paid, or in which the defendant or either of the defendants resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed or paid, unless there is a special contract to the contrary;

3. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for damages for injury to person, property, or reputation; in the county where the injury was committed, or in which the defendant or either of the defendants reside;

4. When the defendant is a nonresident of the county; in any county where he may be found and served with summons personally;

5. When the defendant is a nonresident of the state; in any county of the state;

6. When the parties voluntarily appear and plead, without summons; in any county of the state;

7. In all other cases; in any county in which the defendant, or any one of the defendants, if there be more than one, reside, or may be found and served with summons personally.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R. C. M. 1921; amd. Sec. 15, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 832.

Amendments

The 1973 amendment deleted "any township of" before references to the county in paragraphs 1 to 4 and 7; substituted "county" for "township" in paragraphs 5 and 6; and made minor changes in phraseology.

93-6602. (9620) Place of trial may be changed in certain cases. The court may, at any time before trial, on motion, change the place of trial in the following cases:

1. and 2. *** [Same as parent volume.]

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the county, town, or city against him.

4. and 5. *** [Same as parent volume.]

History: Ap. p. Sec. 594, p. 160, Bannack Stat.; re-en. Sec. 700, p. 176, Cod. Stat. 1871; re-en. Sec. 760, 1st Div. Rev. Stat. 1879; re-en. Sec. 780, 1st Div. Comp. Stat. 1887; en. Sec. 1481, C. Civ. Proc. 1895; re-en. Sec. 6987, Rev. C. 1907; re-en.

Sec. 9620, R. C. M. 1921; amd. Sec. 16, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 833.

Amendments

The 1973 amendment substituted "county" for "township" near the end of paragraph 3.

CHAPTER 67—JUSTICES' COURTS—MANNER OF COMMENCING ACTIONS IN

Section 93-6706. Summons—how issued, directed and what to contain.
93-6711. Service of summons.

93-6706. (9631) Summons—how issued, directed and what to contain. The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, the name of the county and city in which the action is commenced, and the names of the parties thereto;

2. and 3. *** [Same as parent volume.]

History: Ap. p. 556, p. 152, Bannack Stat.; re-en. Sec. 662, p. 169, Cod. Stat. 1871; re-en. Sec. 722, 1st Div. Rev. Stat. 1879; re-en. Sec. 742, 1st Div. Comp. Stat. 1887; en. Sec. 1505, C. Civ. Proc. 1895; re-en. Sec. 6998, Rev. C. 1907; re-en. Sec. 9631, R. C. M. 1921; amd. Sec.

1, Ch. 91, L. 1939; amd. Sec. 17, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 844.

Amendments

The 1973 amendment deleted "or township" following "name of the county and city" in paragraph 1.

93-6711. (9636) Service of summons. The summons may be served by a sheriff or constable of any of the counties of this state; provided, that when a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of the county in which it was issued, to the effect that the person issuing the same was an acting

justice of the peace at the date of the summons; or the summons may be served by any male person resident in the state, over the age of eighteen (18) years, not a party to the suit, and must be served and returned as provided in Montana Rules of Civil Procedure, Rule 4D (2), (3), (4), (8), and (9); or it may be served by publication, provided in Montana Rules of Civil Procedure, Rule 4D (5) and (8), so far as they relate to publication of summons, are made applicable to justices' courts; the word "justice" being substituted for the word "clerk" whenever the latter word occurs.

History: En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; re-en. Sec. 9636, R. C. M. 1921; amd. Sec. 1, Ch. 110, L. 1967. Cal. C. Civ. Proc. Sec. 850.

Amendments

The 1967 amendment substituted "Montana Rules of Civil Procedure, Rule 4D

(2), (3), (4), (8), and (9)" for "sections 93-3006 and 93-3007" after "as provided in"; and substituted "provided in Montana Rules of Civil Procedure, Rule 4D (5) and (8)" for "and sections 93-3013, 93-3014 and 93-3015" after "by publication."

CHAPTER 68—JUSTICES' COURTS—PLEADINGS IN

Section 93-6802.1. Permissible pleadings enumerated.
93-6802.2. Demurrers and pleas abolished.

93-6802. (9639) Pleadings in justices' courts.

Compiler's Notes

This section appears to have been

superseded by secs. 93-6802.1 and 93-6802.2.

93-6802.1. Permissible pleadings enumerated. In justice court there shall be a complaint and answer; and there shall be a reply to a counterclaim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who is not an original party is brought into the action; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

History: En. Sec. 1, Ch. 168, L. 1967.

Title of Act

An act designating the pleadings to be allowed in justice court and designating the form thereof.

93-6802.2. Demurrers and pleas abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

History: En. Sec. 2, Ch. 168, L. 1967.

Repealing Clause

Section 3 of Ch. 168, Laws 1967 repealed all acts and parts of acts in conflict therewith.

CHAPTER 69—JUSTICES' COURTS—PROVISIONAL REMEDIES—ARREST IN CIVIL ACTIONS—ATTACHMENT—CLAIM AND DELIVERY

Section 93-6903. A defendant arrested must be taken before the justice immediately.

93-6903. (9654) A defendant arrested must be taken before the justice immediately. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is

absent or unable to try the action, or if it appears to him by the affidavit of defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the county, if there is another, and if not, then before a justice of an adjoining county, who must take jurisdiction of the action, and proceed thereon as if the summons had been issued and the order of arrest made by him.

History: En. Sec. 562, p. 154, Bannack Stat.; re-en. Sec. 668, p. 171, Cod. Stat. 1871; re-en. Sec. 728, 1st Div. Rev. Stat. 1879; re-en. Sec. 748, 1st Div. Comp. Stat. 1887; amd. Sec. 1542, C. Civ. Proc. 1895; re-en. Sec. 7021, Rev. C. 1907; re-en. Sec. 9654, R. C. M. 1921; amd. Sec. 18, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 863.

Amendments

The 1973 amendment substituted "county" for "town, township, or city" in the middle of the section; and substituted "adjoining county" for "adjoining township" near the end of the section.

CHAPTER 73—JUSTICES' COURTS—JUDGMENT IN

Section 93-7302. Judgment of dismissal entered in certain cases without prejudice.
93-7311. Abstract of judgment.

93-7302. (9680) Judgment of dismissal entered in certain cases without prejudice. Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases:

1. to 3. *** [Same as parent volume.]

4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county; but if the objection is taken and overruled, it is the cause of a reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

History: Ap. p. Sec. 612, p. 164, Bannack Stat.; re-en. Sec. 718, p. 179, Cod. Stat. 1871; re-en. Sec. 778, 1st Div. Rev. Stat. 1879; re-en. Sec. 798, 1st Div. Comp. Stat. 1887; amd. Sec. 1624, C. Civ. Proc. 1895; re-en. Sec. 7050, Rev. C. 1907; re-en. Sec. 9683, R. C. M. 1921; amd. Sec. 2, Ch.

34, L. 1937; amd. Sec. 19, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 890.

Amendments

The 1973 amendment deleted "or township, town, or city" immediately preceding the first semicolon in paragraph 4.

93-7311. (9689) Abstract of judgment. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

"State of Montana

County of _____

_____, plaintiff, v. _____, defendant.

In justice's court, before _____, justice of the peace, _____ county, _____, 19__ (inserting date of abstract). Judgment entered for plaintiff (or defendant) for \$_____, on the _____ day of _____. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of _____, justice of the peace, as it appears by his docket, now in my possession, as his successor in office.

_____, Justice of the Peace.

History: Ap. p. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 7056, Rev. C. 1907; re-en. Sec. 9689, R. C. M. 1921; amd. Sec. 20,

Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 897.

Amendments

The 1973 amendment substituted "county" for "township (city or town)" in the caption of the abstract.

CHAPTER 74—JUSTICES' COURTS—EXECUTION FROM

Section 93-7402. Form of execution.

93-7402. (9694) Form of execution. The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its issuance. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county where, and the time when, it was rendered; the amount of the judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of sections 93-5801 to 93-5845, in an execution to the sheriff, except that it shall not direct the officer to in any manner levy upon or satisfy the judgment, or any interest thereon, from any real property.

History: En. Sec. 616, p. 165, Bannack Stat.; amd. Sec. 722, p. 181, Cod. Stat. 1871; re-en. Sec. 782, 1st Div. Rev. Stat. 1879; re-en. Sec. 802, 1st Div. Comp. Stat. 1887; amd. Sec. 1641, C. Civ. Proc. 1895; amd. Sec. 1641, p. 243, L. 1897; re-en. Sec. 7061, Rev. C. 1907; re-en. Sec. 9694,

R. C. M. 1921; amd. Sec. 21, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 902.

Amendments

The 1973 amendment deleted "and the township, town, or city" following "and of the county" in the second sentence.

CHAPTER 76—JUSTICES' COURTS—DOCKETS

Section 93-7605. Proceedings when office becomes vacant and before a successor is appointed.

93-7605. (9707) Proceedings when office becomes vacant and before a successor is appointed. If the office of a justice become vacant by his death or removal from the county, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the county, to be by him delivered to the successor of such justice. If there is no other justice in the county, then the docket and papers of such justice must be deposited in the office of the county clerk, to be by him delivered to the successor in office of the justice.

History: En. Sec. 1664, C. Civ. Proc. 1895; re-en. Sec. 7074, Rev. C. 1907; re-en. Sec. 9707, R. C. M. 1921; amd. Sec. 22, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 915.

Amendments

The 1973 amendment substituted "county" for "township, town, or city," near the beginning of the first sentence; and substituted "county" for "township" near the end of the first sentence and near the beginning of the second sentence.

93-7607. (9709) Justice elected to fill vacancy. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same county from that time is the successor.

History: En. Sec. 1666, C. Civ. Proc. 1895; re-en. Sec. 7076, Rev. C. 1907; re-en. Sec. 9709, R. C. M. 1921; amd. Sec. 23, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 917.

Amendments

The 1973 amendment substituted "county" for "township, town, or city" near the end of the section.

CHAPTER 77—JUSTICES' COURTS—GENERAL PROVISIONS

Section 93-7704. In case of disability of justice, another justice may attend on his behalf.

93-7709. Special constables—appointment.

93-7712. Depositions—how taken.

93-7704. (9714) In case of disability of justice, another justice may attend on his behalf. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same county, or adjoining county may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

History: En. Sec. 626, p. 168, Bannack Stat.; re-en. Sec. 732, p. 184, Cod. Stat. 1871; re-en. Sec. 792, 1st Div. Rev. Stat. 1879; re-en. Sec. 812, 1st Div. Comp. Stat. 1887; amd. Sec. 1683, C. Civ. Proc. 1895; re-en. Sec. 7081, Rev. C. 1907; re-en.

Sec. 9714, R. C. M. 1921; amd. Sec. 24, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 992.

Amendments

The 1973 amendment substituted "county, or adjoining county" for "township, town, or city, or adjoining township" in the middle of the first sentence.

93-7709. (9719) Special constables—appointment. If in any township there should be no duly elected, appointed, or qualified constable, but not otherwise, a justice of the peace in the county may, at the request of a party, after being satisfied that it is expedient to do so, specially depute any proper person of suitable age not interested in the action to serve a summons, with or without an order to arrest the defendant, or with or without a writ of attachment, or to serve an execution. The justice shall be liable upon his official bond for all official acts of the person so deputed. Such deputation shall be in writing made on the process, and a note thereof made on the justice's docket.

History: En. Sec. 627, p. 168, Bannack Stat.; re-en. Sec. 733, p. 184, Cod. Stat. 1871; re-en. Sec. 793, p. 187, 1st Div. Rev. Stat. 1879; re-en. Sec. 813, 1st Div. Comp.

Stat. 1887; amd. Sec. 1688, C. Civ. Proc. 1895; amd. Sec. 1, p. 138, L. 1899; re-en. Sec. 7086, Rev. C. 1907; re-en. Sec. 9719, R. C. M. 1921; amd. Sec. 25, Ch. 491, L. 1973.

Amendments

The 1973 amendment substituted "in the county" for "in such township" after

"justice of the peace" in the first sentence.

93-7712. (9722) Depositions—how taken. Depositions to be used in justices' courts shall be taken as provided in Rules 26 and 28 to 32, inclusive of the Montana Rules of Civil Procedure.

History: En. Sec. 1691, C. Civ. Proc. 1895; re-en. Sec. 7089, Rev. C. 1907; re-en. Sec. 9722, R. C. M. 1921; amd. Sec. 1, Ch. 167, L. 1967.

"shall" for "may" after "justices' courts"; and substituted "Rules 26 and 28 to 32, inclusive of the Montana Rules of Civil Procedure" for "sections 93-1801-1 to 93-1801-6."

Amendments

The 1967 amendment substituted

CHAPTER 79—JUSTICES' COURTS—APPEALS FROM, TO DISTRICT COURTS

93-7907. (9760) Procedure on appeal, etc.

Dismissal of Appeal

Where defendant filed notice of appeal of adverse verdict in justice court with an undertaking on May 8, 1969 but took no further action, district court properly

granted plaintiff's motion to dismiss for unnecessary delay on July 1, 1970, since it was appellant's burden as moving party to bring appeal on for hearing. *Eide Ins. v. Correll*, 156 M 167, 478 P 2d 272.

CHAPTER 80—SUPREME COURT—APPEALS TO

Section 93-8001. How judgments and orders may be reviewed.

93-8002. Party aggrieved may appeal—names of parties.

93-8013. Deposit in lieu of undertaking.

93-8001. (9729) How judgments and orders may be reviewed. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in sections 93-7901 to 93-7908, and by the Rules of Appellate Civil Procedure, and not otherwise.

History: En. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 936.

M. R. App. Civ. P. amend this section, and sections 93-8002 and 93-8013 which contain references to appeals from justices' courts to district courts, so as to preserve the existing procedure applicable to such appeals.

Amendments

The 1965 amendment substituted "by the Rules of Appellate Civil Procedure" for "93-8001 to 93-8023" after "93-7908 and" and made a minor change in punctuation.

Advisory Committee's Note

Subdivisions (c), (d), (e) of Rule 41,

93-8002. (9730) Party aggrieved may appeal—names of parties. A party aggrieved may appeal in the cases prescribed in sections 93-7901 to 93-7908 and the Rules of Appellate Civil Procedure.

History: En. Sec. 248, p. 94, Bannack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420,

1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 938.

Amendments

The 1965 amendment substituted "the Rules of Appellate Civil Procedure" for "93-8001 to 93-8023" at the end of the

present section and omitted a former second sentence which read: "The party appealing is known as the appellant, and the adverse party as the respondent."

93-8003 to 93-8006. (9731 to 9734) Superseded — M. R. App. Civ. P., Rules 1 and 4 to 6.

Supersession

These sections (Ap. p. Secs. 251, 252, 262, pp. 95, 97, Bannack Stat.; Secs. 320, 331, pp. 199, 201, L. 1867; Secs. 408 to 410, 431, pp. 150, 151, 157, L. 1877; Sec. 1, pp. 146, 147, L. 1899; Secs. 10, 11, Ch. 225, L. 1921; Sec. 1, Ch. 39, L. 1925;

Sec. 1, Ch. 41, L. 1941), relating to appealable judgments and orders, the taking of an appeal and the time therefor, and the undertaking or deposit on appeal, are superseded by M. R. App. Civ. P., Rules 1 and 4 to 6.

93-8011, 93-8012. (9739, 9740) Superseded—M. R. App. Civ. P., Rules 6 and 7.

Supersession

These sections (Ap. p. Secs. 268, 269, p. 99; Sec. 337, p. 202, L. 1867; Sec. 415, p. 152, L. 1877), relating to stay of pro-

ceedings and undertaking on appeal, are superseded by M. R. App. Civ. P., Rules 6 and 7.

93-8013. (9741) Deposit in lieu of undertaking. In all cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all such cases the undertaking or deposit may be waived by the written consent of the respondent.

History: En. Sec. 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R. C. M. 1921; amd. Sup. Ct. Ord. 11020,

eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 948.

Amendments

The 1965 amendment rewrote this section. For previous text, see parent volume.

93-8014 to 93-8025. (9742 to 9753) Superseded—M. R. App. Civ. P.

Supersession

These sections (Secs. 260, 271, 273, pp. 96, 99, 100, Bannack Stat.; Sec. 342, p. 204, L. 1867; Secs. 418, 426 to 428, pp. 153, 156, L. 1877; Secs. 1733 to 1735, 1737, 1739 to 1744, C. Civ. Proc. 1895; Sec. 2, Ch. 35, L. 1907; Sec. 3, Ch. 42, L. 1907; Sec. 1, Ch. 47, L. 1909; Secs. 12 to

14, Ch. 225, L. 1921; Sec. 1, Ch. 19, L. 1925; Sec. 1, Ch. 87, L. 1929), relating to appeals from district courts, are superseded by the Rules of Appellate Civil Procedure. For designation of superseding rule see M. R. App. Civ. P., Table B.

CHAPTER 86—COSTS AND DISBURSEMENTS—COST BILL— SUIT IN FORMA PAUPERIS

Section 93-8601.1. Contractual right to attorney fees to be reciprocal.
93-8625. Poor person may sue or defend without costs.

93-8601.1. Contractual right to attorney fees to be reciprocal. Whenever by virtue of the provisions of any contract or obligation in the nature of a contract, made and entered into at any time after the effective date of this act, one party to such contract or obligation has

an express right to recover attorney fees from any other party to the contract or obligation in the event the party having that right shall bring an action upon the contract or obligation, then in any action on such contract or obligation all parties to the contract or obligation shall be deemed to have the same right to recover attorney fees, and the prevailing party in any such action, whether by virtue of the express contractual right, or by virtue of this act, shall be entitled to recover his reasonable attorney fees from the losing party or parties.

History: En. Sec. 1, Ch. 259, L. 1971.

Title of Act

An act to extend a contractual right to attorney fees granted to one party to a

contract to the prevailing party in any lawsuit on such contract whether or not the contract expressly provides for such fees as to such prevailing party.

93-8602. (9787) When allowed, of course, to the plaintiff.

Attorney's Fees

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under section 93-8613 since attorney's lien failed to meet "choate" test at

the time the amount of federal taxes owed on the property was fixed. First Nat. Bank of Lewistown v. Tilzey, 238 F Supp 750.

93-8605. (9790) When the several defendants are not united, etc.

References

State ex rel. Gage v. District Court, 148 M 284, 419 P 2d 746, 748.

93-8606. (9791) Costs of appeal discretionary with the court, etc.

References

Stalcup v. Montana Trailer Sales & Equipment Co., 146 M 494, 409 P 2d 542.

93-8613. (9798) Counsel fees on foreclosure.

Intervenor

Where party intervened in action to foreclose mortgage in an effort to have title quieted in his behalf as against both mortgagee and mortgagor, it was error to award intervenor judgment for attorney's fees under this section since intervenor qualified as neither mortgagee bringing foreclosure action nor as possible successful mortgagor defending such action.

Nikles v. Barnes, 153 M 113, 454 P 2d 608.

Priority of Claim

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under this section since attorney's lien failed to meet "choate" test at the time the amount of federal taxes owed on the property was fixed. First Nat. Bank of Lewistown v. Tilzey, 238 F Supp 750.

93-8618. (9802) What are costs and disbursements.

Attorney Fees

Attorney fees are not included as costs under this section, so that if such costs are not allowed under section 21-137, which requires showing by motion that wife cannot take an appeal without the allowance, she is not entitled to them on execution under section 93-8621. State ex rel. Sowerwine v. District Court, 145 M 375, 401 P 2d 568.

depositions for convenience of defendant's counsel could not be included in bill of costs where never filed with the court and plaintiff had no practical means of securing a copy; it was obviously a discovery deposition for defendant's own benefit. Johnson v. Furgeson, 158 M 170, 489 P 2d 1032.

Depositions

In action contesting assessment of net proceeds tax of mining industry, board of equalization was properly assessed costs

Deposition Expenses

Cost to defendant of taking plaintiff's

of contestant's expense of taking deposition of secretary of board of equalization where contestant prevailed and deposition was for the benefit of the court and both parties, having been introduced into evidence by agreement of both parties. *Pfizer, Inc. v. Madison County*, — M —, 505 P 2d 399.

93-8621. (9805) Costs on appeal—how claimed.

Execution Void

In divorce proceeding, inclusion in memorandum of both allowable statutory costs under section 21-137 and attorney's fee, to which the wife was not entitled because of failure to file motion on appeal, constituted noncompliance with this sec-

References

Kintner v. Harr, 146 M 461, 408 P 2d 487; *State ex rel. Ald, Inc. v. District Court*, 147 M 221, 410 P 2d 944.

tion and made the execution void. *State ex rel. Sowerwine v. District Court*, 145 M 375, 401 P 2d 568.

References

State ex rel. Ald, Inc. v. District Court, 147 M 221, 410 P 2d 944.

93-8625. (9809) Poor person may sue or defend without costs. Any person may commence and prosecute or defend an action in any of the courts and administrative tribunals of this state who will file an affidavit stating that he has a good cause of action or defense, that he is unable to pay the costs, or procure security to secure the same; then it is hereby made the duty of the officers of the courts and administrative tribunals to issue all writs and serve the same, and perform all services in the action, without demanding or receiving their fees in advance.

History: En. Sec. 2, p. 71, L. 1869; re-en. Sec. 563, p. 150, Cod. Stat. 1871; amd. Sec. 1, p. 40, Ex. L. 1873; amd. Sec. 503, p. 173, L. 1877; re-en. Sec. 503, 1st Div. Rev. Stat. 1879; re-en. Sec. 516, 1st Div. Comp. Stat. 1887; re-en. Sec. 1873, C. Civ. Proc. 1895; re-en. Sec. 7176, Rev. C. 1907; re-en. Sec. 9809, R. C. M. 1921; amd. Sec. 1, Ch. 71, L. 1971; amd. Sec. 1, Ch. 90, L. 1973.

Preamble

Chapter 90 of Laws 1973 contained a

preamble which read: "WHEREAS, section 93-8625, R. C. M. 1947, gives the right to sue or defend in any of the courts of this state to poor persons without costs, amendment should be made to remove any ambiguity as to whether this would also include administrative tribunals."

Amendments

The 1971 amendment inserted "or defend" and "or defense."

The 1973 amendment inserted "and administrative tribunals" in two places.

CHAPTER 89—UNIFORM DECLARATORY JUDGMENTS ACT

93-8901. (9835.1) Scope.

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Declaratory Judgments Act: Oklahoma and Virginia.

Contracts

In proceeding under this act, court's resolution of ambiguity on face of contract constituted construction, not contract reformation. *Heller v. Osburnsen*, — M —, 510 P 2d 13.

Supreme Court

Supreme court could accept original jurisdiction in suit for declaratory judgment where statute which taxed nonresident

contractors indiscriminately was declared unconstitutional, since supreme court was a court of record and under its own rules could accept original jurisdiction in emergency situations. *State ex rel. Schultz-Lindsay Constr. Co. v. State Board of Equalization*, 145 M 380, 403 P 2d 635.

Supreme court could entertain original action for declaratory judgment on calling, election of delegates to and implementation of constitutional convention required by vote of the electors in view of necessity for legislature to act within 60-day session then in progress. *Forty-Second Legislative Assembly v. Lennon*, 156 M 416, 481 P 2d 330.

Termination of Annexation Proceedings

Where a majority of the resident freeholders of a first class city validly protested proposed annexation under section 11-403 (1), but city council instead of terminating the annexation proceedings took arbitrary action, mandamus was proper to compel council to terminate

the process. This chapter did not furnish the protestants a plain, speedy and adequate remedy. *State ex rel. Konen v. City of Butte*, 144 M 95, 394 P 2d 753, 757.

References

Harrer v. Northern Pacific Ry. Co., 147 M 130, 410 P 2d 713.

93-8906. (9835.6) Discretionary.**Discretion of Court**

In absence of showing of abuse of discretion, refusal of lower court to rule on issue for reason that decree would not terminate controversy or remove uncertainty will not be reversed. *Helena Valley Irrig. Dist. v. State Highway Commission*, 150 M 192, 433 P 2d 791.

Dismissal of Action

Court did not abuse its discretion in dismissing insurance company's action for

declaratory judgment that defendant's policy was void because obtained by fraud, since, under section 93-8911, there were possible parties not joined, defendant having been in an accident several months prior to expiration of the policy, and under this section, court could refuse to enter the judgment on the basis that it would not terminate the controversy as to all parties. *Empire Fire & Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

93-8909. (9835.9) Jury trial.**References**

Mahan v. Hardland, 147 M 78, 410 P 2d 156.

93-8911. (9835.11) Parties.**Dismissal of Action**

Court could take into account this section in refusing to grant declaratory judgment in favor of insurance company which claimed that defendant's policy was void when accident in which he was involved occurred because there were other parties not joined and therefore the declar-

atory judgment would not terminate the controversy should other parties sue defendant. *Empire Fire & Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

References

Harrer v. Northern Pacific Ry. Co., 147 M 130, 410 P 2d 713.

93-8912. (9835.12) Construction.**References**

Harrer v. Northern Pacific Ry. Co., 147 M 130, 410 P 2d 713.

CHAPTER 90—CERTIORARI (WRIT OF REVIEW)**93-9002. (9837) When and by what courts granted.****References**

Mailey v. Board of County Commrs., 142 M 505, 385 P 2d 74.

93-9008. (9843) The review under the writ, extent of.**References**

Mailey v. Board of County Commrs., 142 M 505, 385 P 2d 74.

CHAPTER 91—MANDAMUS (WRIT OF MANDATE)

93-9102. (9848) When and by what court issued.**Clear Legal Duty**

Board of county commissioners was properly denied writ of mandate requiring sheriff to provide detailed itemized accounting of county funds received for furnishing board to prisoners of county jail since sheriff has no clear legal duty to provide such an accounting. State ex rel. Lucier v. Murphy, 156 M 186, 478 P 2d 273 (Decision prior to 1971 amendment of section 16-2818).

Discretionary Actions

Mandamus lies only to compel performance of an act, not to correct action already done, so that where state board of land commissioners exercised discretion in awarding lease of land to lowest bidder, mandamus was not the proper writ to pursue in seeking a remedy. State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

Trial court properly denied writ of

mandate, sought pursuant to this section, to require city to condemn private lands for use as public streets, since this section provides for performance of ministerial duty and not duty or power that requires exercise of discretion. State ex rel. Wiedman v. City of Kalispell, 154 M 31, 459 P 2d 694.

Termination of Annexation Proceedings

Where a majority of the resident freeholders of a first class city validly protested proposed annexation under section 11-403 (1), but city council instead of terminating the annexation proceedings, took arbitrary action, mandamus was proper to compel council to terminate the process. The Uniform Declaratory Judgments Act (93-8901 to 93-8916) did not furnish the protestants a plain, speedy and adequate remedy. State ex rel. Konen v. City of Butte, 144 M 95, 394 P 2d 753, 757.

93-9103. (9849) Writ—when and upon what to issue.**Adequacy of Other Remedy**

Where subsequent tax sale certificates purchaser gave notice of intention to apply for tax deed on certain date and prior certificates purchaser tendered payment to county treasurer for redemption of such subsequent certificates but his tender was refused, writ of mandate was proper remedy to effect his redemption, since no other available remedies would be certain, plain, adequate, or speedy. State ex rel. Burkhartsmeier Bros. v. McCormick, — M —, 510 P 2d 266.

Appealable Matters

Engineer seeking registration from state

board had no right to a writ of mandamus where discretion of the board was subject to review under section 66-2345. Heldenbrand v. Montana State Board of Registration for Professional Engineers and Land Surveyors, 147 M 271, 411 P 2d 744.

Mandamus to Compel Disqualification of Justice of the Peace

Since section 95-2009, by providing for a trial de novo in the district court, provided a plain, adequate and speedy remedy at law, mandamus did not lie to compel justice of the peace to honor motion for disqualification. Bailey v. State, — M —, 517 P 2d 708.

93-9109. (9855) Motion for new trial—where made.**Motion Not Required**

This section does not require motion for new trial in order to appeal from a grant of mandamus, but merely sets out

the place of filing for a motion for new trial. State ex rel. Bennett v. Dowdall, 157 M 11, 482 P 2d 572.

93-9112. (9858) Damages, costs and peremptory mandate, etc.**Damages Incidental to Pleading**

After repeated refusals by county to follow assessment procedures prescribed by state board of equalization, and after other delays and hindrances by the county, including the filing of sham pleadings, Supreme Court will, if there is further delay in complying with writ of mandamus,

consider assessing costs and damages under this section. State ex rel. State Board of Equalization v. Price, 157 M 134, 483 P 2d 284.

References

State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

CHAPTER 92—PROHIBITION—WRIT OF

93-9201. (9861) Prohibition defined.

Judicial Error Required

Writ of prohibition was issued, pursuant to this section, where district court had acted beyond its jurisdiction by enjoining board of equalization from revising grading and valuation on nonirrigated farm land pursuant to section 84-429.7 et seq. State ex rel. Lord v. District Court, 154 M 269, 463 P 2d 323.

Municipal Corporation

Lower court properly refused petition for writ of prohibition against city acting within jurisdiction since writ lies only when municipal corporation acts without or in excess of jurisdiction. State ex rel.

Pat. Griffin Co. v. City of Butte, 151 M 546, 445 P 2d 739.

Public Service Commission

Since federal price-freeze order did not prevent rate hearings by the public service commission, though it did prevent putting increases into effect, commission had jurisdiction to hold hearings and writ of prohibition was improper. State ex rel. Department of Public Service Regulation v. District Court, 158 M 88, 488 P 2d 1147.

References

State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P 2d 842, 844.

CHAPTER 97—FORCIBLE ENTRY AND UNLAWFUL DETAINER—ACTIONS FOR

Section 93-9705. What courts have jurisdiction.

93-9703. (9889) Unlawful detainer defined.

Agricultural Tenant Holding Over

Statute gives agricultural tenant right to hold over for no other purpose than to harvest crops and protect investment and does not mean that tenant can exercise option to purchase contained in expired lease. Miller v. Meredith, 149 M 125, 423 P 2d 595.

Landlord-tenant Relationship Required

An action for unlawful detainer can succeed only where the relation of landlord-tenant exists. Kransky v. Hensleigh, 146 M 486, 409 P 2d 537.

Unlawful Ejectment

In case of unlawful ejectment, plaintiff, who had farmed land for three years, paying one third of each crop as rent, was not a sharecropper but a tenant with an interest in the land for a term and it was proper for the judge to instruct the jury that if plaintiff held without notice to quit more than sixty days after expiration of his term he was deemed to be holding by permission of the defendant-landlords and not guilty of unlawful detainer. Kenfield v. Curry, 145 M 174, 399 P 2d 999.

93-9705. (9891) What courts have jurisdiction. The district court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; provided, that justices' courts, within their respective counties, shall have concurrent jurisdiction.

History: En. Sec. 2084, C. Civ. Proc. 1895; re-en. Sec. 7273, Rev. C. 1907; re-en. Sec. 9891, R. C. M. 1921; amd. Sec. 26, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 1163.

Amendments

The 1973 amendment substituted "counties" for "towns, townships, or cities" near the end of the section.

Repealing Clause

Section 27 of Ch. 491, Laws 1973 read "Sections 25-303, 25-305, and 25-306, R. C. M. 1947, are repealed."

CHAPTER 98—CONTEMPTS

93-9801. (9908) What acts or omissions are contempts.

Criticism of Decisions

Bank president's statement that he was displeased with jury verdict against bank

and that jurors could not expect to do business with bank did not constitute contempt under subsection 9, since jurors

did continue to do business with bank and since statement came twenty-two days after final disposition of case and could not have interfered with court proceedings. State ex rel. Polish v. District Court Third Judicial District in and for County of Powell, 156 M 220, 478 P 2d 270.

References

Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

93-9803. (9910) A contempt committed in the presence of the court, etc.

Recital of Facts in Order

Order of contempt that failed to specify facts that constituted contempt before the court was deficient under this section,

since it did not provide opportunity for appellate review. State ex rel. Shea v. District Court, 156 M 266, 479 P 2d 281.

93-9810. (9917) Judgment and penalty, if guilty.

Excessive Penalty

District court's sentence of ten days' imprisonment for contempt exceeded

jurisdiction of such court as vested in it by this section. Fuchs v. District Court, 153 M 485, 458 P 2d 776.

CHAPTER 99—EMINENT DOMAIN

- Section 93-9902. What are public uses.
- 93-9902.1. Policy on surface mining or open pit mining of coal.
- 93-9905. Facts necessary to be found before condemnation.
- 93-9908. The complaint and its contents.
- 93-9911. Power of court—preliminary condemnation order.
- 93-9912. Appointment and meeting of commissioners.
- 93-9913. The date with respect to which compensation shall be assessed.
- 93-9921.1. Necessary expenses of litigation.
- 93-9927. Relocation assistance—purpose of act.
- 93-9928. Definition of terms in relocation assistance law.
- 93-9929. Payments to displaced persons—moving expense allowance—business losses.
- 93-9930. Additional payments for displacement from dwelling owned by occupant.
- 93-9931. Additional payments for displacement from rented dwelling.
- 93-9932. Relocation advisory services.
- 93-9933. Assurance of availability of suitable replacement dwellings.
- 93-9934. Relocation costs included in project costs—replacement housing.
- 93-9935. Public assistance eligibility unimpaired—tax exemption of payments.
- 93-9936. Appeal to district court from administrative determination.
- 93-9937. Appraisal and negotiation policies—time allowed to move—condemnation proceedings.
- 93-9938. Advancement of closing costs and taxes incurred by owner.
- 93-9939. Reimbursement of costs when condemnation proceedings abandoned.
- 93-9940. Expenses included in inverse condemnation judgment or settlement.
- 93-9941. Acquisition of buildings and improvements affected—payments to tenant.
- 93-9942. Duplication of eminent domain payments not intended.
- 93-9943. New rights and powers not created.
- 93-9944. Application to all federally assisted programs.

93-9902. (9934) What are public uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1 to 3. *** [Same as parent volume.]

4. Wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water, and drainage and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs, necessary for collecting and storing water. Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills and smelters for the reduction of ores, also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores, and sites for reservoirs necessary for collecting and storing water. Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

6 to 14. * * * [Same as parent volume.]

15. To mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others; provided, however, the use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use and eminent domain may not be exercised for this purpose.

History: En. Sec. 580, p. 189, L. 1877; re-en. Sec. 580, 1st Div. Rev. Stat. 1879; re-en. Sec. 598, 1st Div. Rev. Stat. 1887; amd. Sec. 2211, C. Civ. Proc. 1895; amd. Sec. 1, p. 135, L. 1899; amd. Sec. 1, Ch. 4, L. 1907; Sec. 7331, Rev. C. 1907; re-en. Sec. 9934, R. C. M. 1921; amd. Sec. 1, Ch. 245, L. 1953; amd. Sec. 6, Ch. 259, L. 1955; amd. Sec. 1, Ch. 216, L. 1961; amd. Sec. 1, Ch. 311, L. 1973; amd. Sec. 1, Ch. 375, L. 1974. Cal. C. Civ. Proc. Sec. 1238.

Amendments

The 1973 amendment added the proviso to subdivision 15.

The 1974 amendment added the provisos to the end of subdivisions 4 and 5.

Electric Power

Legislature has specifically declared that an electric power line is public use for which private property may be taken by eminent domain proceedings under this section, and public use is not confined to actual use by public, but is measured in terms of right of public to use proposed facilities for which condemnation is sought. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

93-9902.1. Policy on surface mining or open pit mining of coal. For the following reasons the state's power of eminent domain may not be exercised to mine and extract coal owned by the plaintiff located beneath the surface of property where the title to the surface is vested in others:

(1) Because of the large reserves of and the renewed interest in coal in eastern Montana, coal development is potentially more destructive to land and watercourses and underground aquifers and potentially more extensive geographically than the foreseeable development of other ores,

metals, or minerals, and affecting large areas of land and large numbers of people;

(2) That in many areas of Montana set forth in (a) hereinabove, the title to the surface is vested in an owner other than the mineral owner, and that the surface owner is putting that surface to a productive use, and it is the public policy of the state to encourage and foster such productive use by such owner, and that to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner as he determines, and is also contrary to public policy as set forth in paragraph four (4) herein below;

(3) The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain;

(4) That it is the public policy of the state to encourage and foster diversity of land ownership and that the surface mining of coal and control of large areas of land by the surface coal mining industry would not foster public policy and further the public interest.

History: En. 93-9902.1 by Sec. 2, Ch. 311, L. 1973.

Title of Act

An act amending section 93-9902,

R. C. M. 1947, to declare that the extraction of coal by strip mining or open pit mining is not a public use; and setting forth the public policy therefor.

93-9904. (9936) Private property defined—classes enumerated.

Discretionary Actions

Action brought to compel state highway commission to construct two interchanges on new interstate highway near town, instead of one interchange as planned, was improperly brought under this section since this section pertains to eminent domain proceedings and issues presented by action were matters of administrative law under section 32-2406. *Erie v. State ex rel. State Highway Commission*, 154 M 150, 461 P 2d 207, distinguished in 155 M 39, 47, 466 P 2d 594.

Judicial Review

In condemnation proceeding involving access to portion of farm divided by interstate highway, district court had power to require state to incorporate in its construction plans such structures as would allow two-lane access across county road where access road benefited general public as well as private property owner; but district court did not have power to require state to submit such plans to court for its approval since such matters were within purview of activities of highway commission. *State ex rel. State Highway Commission v. Lavoie*, 155 M 39, 466 P 2d 594, explained in 159 M 248, 496 P 2d 1140, 1143.

More Necessary Public Use

Requirement under section 93-9906 that taking of private property by condemnation proceedings must be compatible with greatest public good and least private injury applies specifically to easements and rights of way under this section. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

Public property held by city and taken by state for more necessary public use should be taken and compensated as if it had been taken from a private owner. *City of Three Forks v. State Highway Commission*, 156 M 392, 480 P 2d 826.

Underpass

Where 40.89 acres of ranch land were taken by the state highway commission as a right of way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 496.

93-9905. (9937) Facts necessary to be found before condemnation. 1 and 2. * * * [Same as parent volume.]

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. The plaintiff or defendant, or any party interested in the proceedings, can appeal to the supreme court from any finding or judgment made or rendered under this chapter, as in other cases. Such appeal does not stay any further proceedings under this chapter, except that the district court on motion or ex parte may grant a stay for such period of time and under such conditions as the court deems proper.

History: En. Sec. 583, p. 191, L. 1877; re-en. Sec. 583, 1st Div. Rev. Stat. 1879; re-en. Sec. 601, 1st Div. Comp. Stat. 1887; amd. Sec. 2214, C. Civ. Proc. 1895; re-en. Sec. 7334, Rev. C. 1907; re-en. Sec. 9937, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 1241.

Advisory Committee's Note

Subdivision (f) Rule 41, M. R. App. Civ. P., amends the provision of subdivision 3 of this section to permit the district court to stay proceedings on appeals in eminent domain cases, as is permitted by Rule 7(a) of these rules in other cases. See Tables A, B, C, M. R. App. Civ. P. for reference to other amendments.

Amendments

The 1965 amendment added the exception at the end of the section.

Burden of Proof

Where commission condemned defendant's land to build bypass through it rather than reconstruct highway through town, it became incumbent upon the defendant to show fraud, abuse of discretion or arbitrary action in order to defeat the commission's action, while the commission had only to establish that the taking of the property was reasonably necessary for rebuilding the highway and that their decision appeared to be compatible with the greatest public good and least private injury on the basis of conflicting evidence. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283, distinguished in 155 M 39, 47, 466 P 2d 594.

Condemnor's Discretion

Highway commission did not abuse its discretion in taking farm land by eminent domain even though it was shown that town through which old highway had passed would be financially harmed and bypass would cost more to build, since the resulting savings in travel costs to highway users, in addition to the compensation paid the petitioners, offset disadvantages claimed by them. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283, distinguished in *State Highway Commission v. Danielsen*, 146 M 539, 409 P 2d 443; 155 M 39, 47, 466 P 2d 594.

Necessity of Use

The word "necessary" as used in this section does not mean that the property must be indispensable to the proposed project, but that it must be reasonably requisite and proper for the accomplishment of the purpose for which it is sought under the peculiar circumstances of each case. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283.

Before district court may order condemnation, this section requires that it must find that proposed taking is necessary to public use under circumstances of individual case. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

References

State Highway Commission v. Danielsen, 146 M 539, 409 P 2d 443.

93-9906. (9938) Parties may make location—may enter, etc.

Compatible with Public Good

Where power company had studied alternate routes for power lines, surveyed surrounding area and determined that best possible route for such line was across defendant's property, utility had complied with this section in that taking of private property was compatible with

greatest public good and least private injury. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

References

State Highway Commission v. Danielsen, 146 M 539, 409 P 2d 443.

93-9908. (9940) The complaint and its contents. The complaint must contain:

1. * * * [Same as parent volume.]
2. The names of all owners, mortgagees and lien holders of record and any other claimants of the property of record, if known, or a statement that they are unknown, who must be styled defendants.
- 3 to 5. * * * [Same as parent volume.]
6. If a sand, stratum or formation suitable for use as an underground natural gas storage reservoir is sought to be appropriated, a description thereof and of the land in which it is alleged to be contained, and a description of all other property and rights sought to be appropriated for use in connection with the appropriation of the right to store natural gas in and withdraw natural gas from such reservoir. In addition, the complaint shall state facts showing that the underground reservoir is one subject to appropriation by plaintiff; also stating that the underground storage of natural gas in the land sought to be appropriated is in the public interest; that the underground reservoir is suitable and practicable for natural gas storage; that the plaintiff in good faith has been unable to acquire the rights sought to be appropriated hereunder and a statement that the rights and property sought to be appropriated are not prohibited by law; and in addition, the complaint must be accompanied by a certificate from the board of oil and gas conservation as set forth in section 60-804.

History: En. Sec. 586, p. 192, L. 1877; re-en. Sec. 586, 1st Div. Rev. Stat. 1879; re-en. Sec. 604, 1st Div. Comp. Stat. 1887; amd. Sec. 2217, C. Civ. Proc. 1895; re-en. Sec. 7337, Rev. C. 1907; re-en. Sec. 9940, R. C. M. 1921; amd. Sec. 3, Ch. 245, L. 1953; amd. Sec. 8, Ch. 259, L. 1955; amd. Sec. 1, Ch. 197, L. 1973; amd. Sec. 206, Ch. 253, L. 1974. Cal. C. Civ. Proc. Sec. 1244.

Amendments

The 1973 amendment inserted "mortgagees and lien holders of record" following "owners," "any other" before "claimants" and "of record" following "property" in subdivision 2.

The 1974 amendment substituted "the board of oil and gas conservation as set forth in section 60-804" for "the state oil and gas conservation commission as set forth in section 93-804" at the end of subdivision 6.

93-9909. (9941) Summons, what to contain, etc.

Service of Complaint with Summons

Requirement that a copy of the complaint must be served with the summons is effectively met, so long as both are served at least twenty days prior to the

time designated for hearing, and there is no requirement that they be served on the same day. State Highway Commission v. District Court, — M —, 499 P 2d 1228, explained in 510 P 2d 9, 11.

93-9911. (9943) Power of court—preliminary condemnation order. The court or judge has power:

- 1 to 4. * * * [Same as parent volume.]
5. If the property sought to be appropriated is a sand, stratum or formation suitable for use as an underground natural gas storage reservoir and the existence and suitability of it for such use has been proved by plaintiff upon substantial evidence, the order of the court or judge shall direct the commissioners to ascertain and determine the amount to be paid by the plaintiff to each person for his interest in the property sought to be appropriated for use as such underground natural gas storage reservoir,

and/or as the annual rental for the use of such underground gas storage reservoir and for the use of so much of the surface as is required in the operation of the said underground gas storage reservoir, and for the use in connection with the creation, operation and maintenance thereof, and for all the native gas contained in said reservoir as compensation and damages by reason of the appropriation of such property; provided, however, the amount to be paid for such native gas and all thereof shall be no less than the market value of such gas.

The court shall appoint three (3) persons, qualified as experts and recommended as such by the board of oil and gas conservation, to assist and advise the commissioners in determining the compensation and damages to be paid by plaintiff to each person for his interest in the property sought to be appropriated and the fees and expenses of such persons shall be chargeable as costs of the proceedings to be paid by the plaintiff.

History: Ap. p. Sec. 589, p. 193, L. 1877; re-en. Sec. 589, 1st Div. Rev. Stat. 1879; re-en. Sec. 607, 1st Div. Comp. Stat. 1887; amd. Sec. 2220, C. Civ. Prov. 1895; re-en. Sec. 7340, Rev. C. 1907; re-en. Sec. 9943, R. C. M. 1921; amd. Sec. 4, Ch. 245, L. 1953; amd. Sec. 10, Ch. 259, L. 1955; amd. Sec. 3, Ch. 234, L. 1961; amd. Sec. 207, Ch. 253, L. 1974. Cal. C. Civ. Proc. Sec. 1247.

Amendments

The 1974 amendment substituted "board of oil and gas conservation" for "oil and gas conservation commission of the state of Montana" near the beginning of the final paragraph.

Repealing Clause

Section 208 of Ch. 253, Laws 1974 read "Sections 28-101, 28-102, 28-107, 28-126, 28-132, 28-409, 46-2303 through 46-2306, 46-2319, 46-2328, 60-125, 60-137, 60-138, 60-146, 60-147, 81-1401.1, 81-1401.2, 81-1403, 81-1505, 82-3001 through 82-3003, 82A-1502 through 82A-1506, 82A-1507.1, 82A-1510, 82A-1511, 82A-1512, 89-103, 89-103.1, 89-103.3, 89-103.4, 89-103.5, 89-103.6, 89-103.8, 89-107, 89-108, 89-126, 89-129 through 89-139, 89-311, 89-827, and 89-828 are repealed."

Access Rights

In condemnation proceeding involving access to portion of farm divided by interstate highway, district court had power to require state to incorporate in its con-

struction plans such structures as would allow two lane access across county road; but district court did not have power to require state to submit such plans to court for its approval since such matters were within purview of activities of highway commission. State ex rel. State Highway Commission v. Lavoie, 155 M 39, 466 P 2d 594.

Necessity of Use

Before district court may order condemnation, this section requires that it must find that proposed taking is necessary to public use under circumstances of individual case. Montana Power Co. v. Bokma, 153 M 390, 457 P 2d 769.

Underpass

Where 40.89 acres of ranch land were taken by the state highway commission as a right of way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. State ex rel. State Highway Commission v. Wheeler, 148 M 246, 419 P 2d 492, 496.

93-9912. (9944) Appointment and meeting of commissioners. Immediately upon making and entering the preliminary condemnation order the judge must meet with the respective parties, or their attorneys of record, for the purpose of appointing condemnation commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other persons interested in such property by reason of the appropriation of such property. The court must thereupon appoint three

(3) qualified, disinterested condemnation commissioners. One of such commissioners shall be nominated by the party or parties plaintiff; one of such commissioners shall be nominated by the party or parties defendant. The third commissioner shall be the chairman and shall be nominated by the two (2) commissioners previously nominated, provided, however, that if said two (2) commissioners fail to make such choice at the time of their appointment, then such nomination shall be made by the presiding judge. Each commissioner shall possess the following qualifications: a citizen of the United States and over eighteen (18) years of age; that he is not more than seventy (70) years of age; that he is in possession of natural faculties, of ordinary intelligence and not decrepit; that he is possessed of sufficient knowledge of the English language; that he was assessed on the last assessment roll of a county within the judicial district in which the action is pending; that he has not been convicted of malfeasance in office, or any felony or other high crime; that he is not related within the sixth degree to any party; that he does not stand in the relation of guardian and ward, master and servant, debtor and creditor, or principal and agent, or partner or surety as to any party. At the time of such meeting and nominations there shall be filed with the court by each nominating party or judge an affidavit of the person so nominated stating substantially as follows: that he has formed no unqualified opinion or belief as to the compensation to be awarded in the proceeding or as to the fairness or unfairness of the plaintiff's offer for the lands and improvements of the defendants; and that he has no enmity against or bias in favor of any party and has not discussed, communicated or overheard or read any discussion or communication from any party relating to values of the lands in question or the compensation offered, demanded or to be awarded; that if selected as a condemnation commissioner he is willing to serve and will well and truly try the issues of compensation and a true decision render according to the evidence and in compliance with the instructions of the court; that he will not discuss the case with anyone except the other commissioners until a decision has been filed with the court.

Immediately upon such nomination and appointment of commissioners the same shall proceed to meet at the time and place stated in the order appointing them, which time shall be not more than ten (10) days after the order of appointing, and proceed to examine the lands sought to be appropriated. At a time appointed by the judge and within said ten (10) day period they shall hear the allegations and evidence of all persons interested in each of the several parcels of land. Such hearing shall be attended by, and presided over by, the presiding judge who shall make all necessary rulings upon procedure and the admissibility of evidence. At the conclusion of the aforesaid hearing, the court or judge shall instruct the commissioners as to the law applicable to their deliberations and shall instruct them that their duty is to determine, solely upon the basis of said examination of lands, the evidence produced at the hearing or hearings and the instructions of the court, the following:

1. to 4. * * * [Same as parent volume.]

5. Where there are two (2) or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award, for said property first determined, as hereinbefore stated, as between plaintiff and all defendants claiming any interests therein; thereafter in the same proceeding the respective rights of each of such defendants in and to the award shall be determined by the commissioners, under supervision and instruction of the court, and the award apportioned accordingly.

History: En. Sec. 608, 1st Div. Comp. Stat. 1887; amd. Sec. 1, p. 269, L. 1891; amd. Sec. 2221, C. Civ. Proc. 1895; re-en. Sec. 7341, Rev. C. 1907; re-en. Sec. 9944, R. C. M. 1921; amd. Sec. 4, Ch. 234, L. 1961; amd. Sec. 19, Ch. 423, L. 1971. Cal. C. Civ. Proc. Sec. 1248.

Amendments

The 1971 amendment reduced the minimum age specified in the fifth sentence of the first paragraph from 21 to 18 years, and made minor changes in style.

Apportionment of Damages

It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation due solely to a distribution of interest. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604, distinguished in *State Highway Commission v. Barnes*, 151 M 300, 443 P 2d 16.

Expert Testimony as to Value

Testimony of expert witnesses showing that although presently used for agricultural purposes, highest and best use of land was for residential subdivision, showing comparative values of similar land in same geographical area, and showing how property could have been subdivided and how highway running through it detracted from its suitability for subdivision, was sufficient to sustain jury's verdict as against contention of state that expert witnesses based their opinions on mere speculation. *Montana State Highway Commission v. Jacobs*, 150 M 322, 435 P 2d 274, explained in 155 M 176, 183, 468 P 2d 749.

Measurement of Damages

Where jury in condemnation action awarded damages for land taken in excess of amount requested by landowner and testified to by expert appraisers, trial court properly granted a new trial notwithstanding fact that total award was equal to amount sought by landowner as total damages. *State Highway Commission v. Emery*, 156 M 507, 481 P 2d 686.

Measure of Damages—Leasehold Interests

The proper value of a leasehold interest is the fair market value not the market value less future rent to be paid. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

Noncontiguous Lands

Although the general rule in eminent domain proceedings requires that the land for which depreciation damages are sought be contiguous to that from which severance is made, the landowner may claim, as an exception to the general rule, that the unity of use within an integrated operation to which he applies noncontiguous lands is of such a character that after severance they cannot be fully utilized to their best and most valuable use; where highway right of way traversed a tract of ranch land so as to separate it into two parcels with no access for six and a half miles, court properly permitted testimony concerning damage to two other noncontiguous tracts used as a part of landowner's ranching operation. *State Highway Commission v. Renfro*, — M —, 505 P 2d 403.

Severance Damages

While it is proper for the trial court to determine whether there has been an impairment of access, the question of the extent to which access has been impaired is for the jury, and it was not error for the court to refuse to give instructions to the effect that all means of access to the defendant's property had been destroyed. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

To determine what is "remainder" of property taken under statute providing for damages for depreciation in value of portion of land not sought to be condemned, there are generally three tests: (1) unity of ownership, (2) contiguity, (3) unity of use; claimant who conveyed part of tract of subsequently condemned land to corporation was not entitled to compensation for depreciation in value to land he still held because claimant and corporation were two distinct owners and hence unity of ownership was absent even though claimant was majority shareholder of cor-

puration and lands were contiguous. *Montana State Highway Commission v. Robertson & Blossom Inc.*, 151 M 205, 441 P 2d 181.

Verdict Form

It was not prejudicial error for the

trial judge to give the jury a verdict form which was in accord with this section and which verdict was not out of proportion to the damage done the defendant. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

93-9913. (9945) The date with respect to which compensation shall be assessed. For the purpose of assessing compensation the right thereto shall be deemed to have accrued at the date of the service of the summons, and its actual value as of that date shall be the measure of compensation for all property to be actually taken, and the basis of depreciation in value of property not actually taken, but injuriously affected. This shall not be construed to limit the amount of compensation payable by the department of highways under the provisions of any legislation enacted pursuant to the Federal Highway Beautification Act of 1965. If an order be made letting the plaintiff into possession, as provided in section 93-9920, the full amount finally awarded shall draw lawful interest from the date on which the property owner surrenders possession of the property in accordance with the terms of such order to the earlier of the following dates:

(a) The date on which the right to appeal to the Montana supreme court expires, or if appeal is filed, to the date of final decision by the supreme court, or

(b) The date on which the property owner withdraws from court the full amount finally awarded.

If the property owner withdraws from court a fraction of the amount finally awarded, interest on such fraction shall cease on the date it is withdrawn but interest on the remainder of the amount finally awarded shall continue to the earlier of the aforesaid dates defined in (a) and (b) of this section. None of the amount finally awarded shall draw interest after the date on which the right to appeal to the Montana supreme court expires. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or depreciation in value, nor shall the same be used as the basis of computing such compensation or depreciation.

History: En. Sec. 591, p. 194, L. 1877; re-en. Sec. 591, 1st Div. Rev. Stat. 1879; re-en. Sec. 609, 1st Div. Comp. Stat. 1887; amd. Sec. 2222, C. Civ. Proc. 1895; re-en. Sec. 7342, Rev. C. 1907; re-en. Sec. 9945, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1957; amd. Sec. 5, Ch. 234, L. 1961; amd. Sec. 1, Ch. 182, L. 1965; amd. Sec. 1, Ch. 187, L. 1967; amd. Sec. 12, Ch. 212, L. 1969; amd. Sec. 208, Ch. 316, L. 1974. Cal. C. Civ. Proc. Sec. 1249.

Amendments

The 1965 amendment divided the section into paragraphs; substituted "full amount finally awarded" for "amount awarded" before "shall draw lawful interest" in the third sentence of the first paragraph; substituted "earlier of the following dates" and clauses (a) and (b) at the end of the first paragraph for "date of receipt of the award or any portion thereof"; and substituted the first two sentences of the final paragraph for "provided, however, that interest shall not be allowed or paid on so much thereof as shall have been paid to the landowner involved or withdrawn by such landowner from the court."

Compiler's Notes

The Federal Highway Beautification Act of 1965, referred to in the first paragraph of this section, is compiled in the United States Code as Tit. 23, secs. 131, 136 and 319.

The 1967 amendment added to the first sentence of the initial paragraph, "and the reasonable cost of removal of all necessary personal property from the condemned real property within a reasonable distance in the area, not to exceed the sum of six thousand dollars (\$6,000) in the case of a business, farm or ranch relocation, and not to exceed the sum of four hundred dollars (\$400) in any other case"; inserted the second sentence; and, at the end of subparagraph (a), added "if appeal is filed to the date of final decision by the supreme court, or."

The 1969 amendment deleted the provision, inserted by the 1967 amendment, concerning removal of personality.

The 1974 amendment substituted "department of highways" for "state highway commission" in the second sentence of the first paragraph.

Separability Clause

Section 2 of Ch. 182, Laws 1965 read "If any section, paragraph, sentence, clause or provision of this act shall for any reason be held invalid or unenforceable, the invalidity or unenforceability thereof shall not affect any of the remaining sections, paragraphs, sentences, clauses or provisions of this act."

Repealing Clauses

Section 3 of Ch. 182, Laws 1965 read "All acts, or parts thereof, inconsistent herewith are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed to revive any act or part thereof, heretofore repealed."

Section 209 of Ch. 316, Laws 1974 read "Sections 32-101, 32-301, 32-315, 32-414, 32-417, 32-508, 32-527, 32-712, 32-716, 32-1001, 32-1117, 32-1118, 32-1120, 32-1121, 32-1122, 32-1123, 32-1127, 32-1129, 32-1401, 32-1619, 32-2403, 32-2405, 32-2417, 32-2418, 32-2501 through 32-2503, 32-2701 through 32-2716, 32-3501 through 32-3509, 32-3919, 32-3921, 32-3922, 32-4402, 53-703, 82A-702, 82A-703, and 82A-705 through 82A-708, R. C. M. 1947, are repealed."

Effective Date

Section 4 of Ch. 182, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 4, 1965.

Appeal

In eminent domain proceedings the findings of the district court will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided for by section 14, article III of the Mon-

tana constitution. *State Highway Commission v. Woodcock*, 147 M 291, 411 P 2d 357.

Assessment of Compensation

Where condemnee's house was between 50 and 60 years old and had been converted into a multiple family dwelling, court did not err in excluding evidence of reconstruction costs or comparable sales elsewhere in determining value of the property since there was no way of determining depreciation of the old house in arriving at reconstruction cost figures, nor were there sufficient comparable sales in the area. *State Highway Commission v. Tubbs*, 147 M 296, 411 P 2d 739.

Commercial Use

Where state highway commission in order to show public access to highway presented two appraisal witnesses to show that there was access at a certain exit in which case there would be no loss of commercial usefulness, it was quite proper and necessary to rebut this testimony and to let the jury know the type of easement provided for the access exit. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 498.

Cost of Moving Personal Property

Where friends of condemnees gratuitously aided them in moving personal property from condemned realty, condemnees were not entitled to recover the costs of their friends' labor as an element of damages. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

Depreciation on Inventory

This section requires the state to pay for any damage to personal property removed from condemned land including any depreciation in the inventory value of such property. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

Improvements

In eminent domain proceeding trial court did not err in excluding evidence concerning improvement of sole access road to ranch property remaining after state highway commission had taken part of the property for right of way for interstate highway, where any changes in access were made after the date of service of the summons in the condemnation action. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 497.

Market Value

The proper value of a leasehold interest is the fair market value not the market value less future rent to be paid. *State*

Highway Commission v. City Service Co., 142 M 559, 385 P 2d 604.

Where state not only took part of plaintiff's land, but also eliminated an old channel of water and diked up a new channel, thus creating a flood basin on plaintiff's land, evidence of actual results of taking was proper, even though land values are usually measured as of the date of summons. **State Highway Commission v. Biastoch Meats, Inc.**, 145 M 261, 400 P 2d 274.

When there is a market for the type of property being condemned, and the property has no other intrinsic value, courts will adopt a market value in determining

the actual value of the property, which is nothing more than the price resulting from fair negotiations between a willing seller and buyer. **State Highway Commission v. Tubbs**, 147 M 296, 411 P 2d 739.

Where actual value as determined by jury is based on credible testimony as to market value of highest and best use for which land is available, the verdict and judgment will not be set aside. **State Highway Commission v. Vaughan**, 155 M 277, 470 P 2d 967.

References

State Highway Commission v. Churchwell, 146 M 52, 403 P 2d 751.

93-9915. (9947) Appeal from assessment of commissioners.

Apportionment of Damages

It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence,

and did not reflect an increased valuation due solely to a distribution of title. **State Highway Commission v. City Service Co.**, 142 M 559, 385 P 2d 604, distinguished in **State Highway Commission v. Barnes**, 151 M 300, 443 P 2d 16.

93-9917. (9949) Payment of damages or deposit of bond therefor.

Delay in Payment of Damages

In eminent domain proceedings where the state highway commission did not move within thirty days as required by this section, it could not excuse its failure

to pay by alleging that it had no notice of the entry of judgment when the commission itself had caused the judgment to be entered. **Robertson v. State Highway Commission**, 148 M 275, 420 P 2d 21, 24.

93-9918. (9950) Damages—to whom paid.

Delay in Payment of Damages

In eminent domain proceeding where the state highway commission did not move within thirty days as required by section 93-9917, it could not excuse its failure to pay by alleging that it had no notice of the entry of the judgment when the commission itself had caused the judgment to be entered. **Robertson v. State Highway Commission**, 148 M 275, 420 P 2d 21, 24.

Stay of Execution

Where state highway commission filed notice of appeal and perfected their appeal after writ of execution under this section had issued, the appeal stayed the judgment although no bond was filed as required by section 93-8011 since under Rule 62(e), no security was required from the state. **Robertson v. State Highway Commission**, 148 M 275, 420 P 2d 21, 24.

93-9920. (9952) Putting plaintiff in possession.

References

State Highway Commission v. Schmidt, 143 M 505, 391 P 2d 692 (concurring

opinion); **State Highway Commission v. Churchwell**, 146 M 52, 403 P 2d 751.

93-9921. (9953) Repealed.

Repeal

Section 93-9921 (Sec. 597, p. 195, L. 1877), relating to allowance and appor-

tionment of costs, was repealed by Sec. 2, Ch. 453, Laws 1973. For new law, see sec. 93-9921.1.

93-9921.1. Necessary expenses of litigation. The condemnor, shall within thirty (30) days after an appeal is perfected from the commission-

er's award or report, submit to condemnee a written final offer of judgment for the property to be condemned, together with necessary expenses of condemnee then accrued.

If at any time prior to ten (10) days before trial, the condemnee serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer. In the event of litigation, and when the private property owner prevails, by receiving an award in excess of the final offer of the condemnor, the court shall award necessary expenses of litigation to the condemnee.

History: En. 93-9921.1 by Sec. 1, Ch. 453, L. 1973.

private property owner prevails; repealing section 93-9921, R. C. M. 1947.

Title of Act

An act implementing article II, section 29 of the 1972 Montana constitution, by providing for an award including necessary expenses of litigation when the pri-

Repealing Clause

Section 2 of Ch. 453, Laws 1973 read "Section 93-9921, R. C. M. 1947, is repealed."

93-9927. Relocation assistance—purpose of act. It is the purpose of this act to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms as a result of federally assisted programs, to establish uniform and equitable land acquisition policies for federally assisted programs and to comply with the federal "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."

History: En. Sec. 1, Ch. 3, 2nd Ex. L. 1971.

assistance to persons displaced as a result of acquisition of land for federally assisted programs and to provide for acquisition practices.

Title of Act

An act to provide for relocation as-

93-9928. Definition of terms in relocation assistance law. As used in this act, unless the context otherwise requires:

(1) "Agency" means the state of Montana, a political subdivision of the state or any department, agency or instrumentality of the state of Montana or of a political subdivision of the state.

(2) "Average annual net earnings" means one-half ($\frac{1}{2}$) of any net earnings of a business or farm operation, before federal and state income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from real property acquired for a project of an agency (for which federal financial assistance is available to pay all or any part of the cost) or during such other period as the acquiring agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period.

(3) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

(a) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

(b) for the sale of services to the public;

(c) by a nonprofit organization; or

(d) solely for the purposes of section 3 [93-9929] (1) of this act, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(4) "Displaced person" means any person who, on or after the effective date of this act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of an acquiring agency to vacate real property, for a program or project undertaken by the agency, for which federal financial assistance will be available to pay all or any part of the cost; and solely for the purposes of section 3 [93-9929] (1) and (2) and section 6 [93-9932] of this act, as a result of the acquisition of, or as the result of the written order of, the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project. The term "displaced person" also includes a person who moves or discontinues his business or moves other personal property, or moves from his dwelling as the direct result of code enforcement activities, or a program of rehabilitation of buildings conducted pursuant to a federal program.

(5) "Federal act" means the "Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970" or as that act may be amended.

(6) "Federal financial assistance" means a grant, loan, or contribution provided by the United States except any federal guarantee or insurance.

(7) "Farm operation" means any activity conducted solely or primarily for the production of one (1) or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(8) "Person" means any individual, partnership, corporation or association.

History: En. Sec. 2, Ch. 3, 2nd Ex.
L. 1971.

93-9929. Payments to displaced persons—moving expense allowance—business losses. (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall make payment to the displaced person, upon application as approved by the agency, for:

(a) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(b) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the agency; and

(c) actual reasonable expenses in searching for a replacement business or farm.

(2) In lieu of payments for actual expenses and losses under subsection (1) of this section a person who is displaced from a dwelling may elect to receive a moving expense allowance determined according to a schedule established by the agency and a dislocation allowance, neither of which may exceed the maximum allowances under section 202 (b) of the federal act.

(3) In lieu of payments for actual expenses and losses under subsection (1) of this section a person who is displaced from his place of business or from his farm operation may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation provided that:

(a) the payment shall not be less nor more than the amounts set forth in section 202 (c) of the federal act;

(b) in the case of a business no payment shall be made under this subsection unless the acquiring agency is satisfied that the business cannot be relocated without a substantial loss of its existing patronage and is not a part of a commercial enterprise having at least one (1) other establishment not being acquired by an agency, which is engaged in the same or similar business.

**History: En. Sec. 3, Ch. 3, 2nd Ex.
L. 1971.**

93-9930. Additional payments for displacement from dwelling owned by occupant. (1) In addition to payments otherwise authorized by this act, the acquiring agency shall make an additional payment to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty (180) days prior to the initiation of negotiations for the acquisition of the property. The additional payment shall include the following elements:

(a) the amount may not exceed the amount allowed under section 203 of the federal act,

(b) the amount, if any, which when added to the acquisition cost of the dwelling acquired by the agency, equals the reasonable cost of a comparable replacement dwelling which is a decent, safe, and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and places of employment and available on the private market. All determinations required to carry out this subsection (b) shall be made in accordance with regulations issued by the acquiring agency.

(c) the amount, if any, which will compensate the displaced person for any increased interest costs which the person is required to pay for

financing the acquisition of any comparable replacement dwelling. The amount shall be paid only if the dwelling acquired by the agency was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than one hundred and eighty (180) days prior to the initiation of negotiations for the acquisition of the dwelling. The amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located.

(d) reasonable expenses incurred by the displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(2) The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the one (1) year period beginning on the date on which he received from the agency final payment of all costs of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date.

History: En. Sec. 4, Ch. 3, 2nd Ex.
L. 1971.

93-9931. Additional payments for displacement from rented dwelling. In addition to amounts otherwise authorized by this act the acquiring agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 4 [93-9930] of this act if the dwelling was actually and lawfully occupied by the displaced person for not less than ninety (90) days prior to the initiation of negotiations for acquisition of such dwelling. The payment shall be either:

(1) the amount necessary to enable the displaced person to lease or rent for a period not to exceed four (4) years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed the amount allowable under section 204 of the federal act; or

(2) the amount necessary to enable such person to make a down payment (including reasonable expenses for evidence of title, recording fees, and other closing costs incident to the purchase of a dwelling, but not including prepaid expenses) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities. The amount payable under this subsection (2) shall not

exceed the amount allowable under section 204 of the federal act and shall be subject to the same matching requirements as under said section.

History: En. Sec. 5, Ch. 3, 2nd Ex.
L. 1971.

93-9932. Relocation advisory services. (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall provide a relocation assistance advisory program for displaced persons which offers the services described in this section. If the acquiring agency determines that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, he may offer such person relocation advisory services.

(2) The relocation advisory service may include such budget, debt management and related counseling services as the acquiring agency determines will assist the displaced person. The relocation assistance program shall include such measures, facilities, or services as may be necessary or appropriate in order to:

(a) determine the need, if any, of displaced persons, for relocation assistance;

(b) provide current and continuing information on the availability, prices, and rentals of comparable decent, safe, and sanitary sales and rental housing, and of comparable commercial properties and locations for displaced businesses;

(c) assist a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location;

(d) supply information concerning federal and state housing programs, disaster loan programs and other federal or state programs offering assistance to displaced persons; and

(e) provide other advisory services to displaced persons in order to minimize hardships to displaced persons in adjusting to relocation;

(f) secure the co-ordination of relocation activities with other project activities and other planned or proposed federal or state actions in the community or nearby areas which may affect the relocation program.

(3) In order to prevent unnecessary expenses and duplication of functions and to promote uniform and effective administration of relocation assistance programs, an agency may enter into contracts with any individual, firm, association, or corporation for services in connection with such programs, or may carry out its functions under this act through any federal or state agency having an established organization for conducting relocation assistance programs. Each agency whenever practicable, shall utilize the services of state or local housing agencies, or other agencies having experience in the administration or conduct of similar housing assistance activities.

History: En. Sec. 6, Ch. 3, 2nd Ex.
L. 1971.

93-9933. Assurance of availability of suitable replacement dwellings. Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall assure that, within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the federal agency concerned with administering the federal financial assistance, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment.

History: En. Sec. 7, Ch. 3, 2nd Ex.
L. 1971.

93-9934. Relocation costs included in project costs—replacement housing. The acquiring agency shall include the cost of providing payments and assistance under the provisions of this act in the cost of any project for which federal financial assistance is available to pay all or any part of the cost. The acquiring agency shall also provide the payments and assistance and assure the availability of replacement housing for displaced persons, who are displaced as a result of real property being acquired by an agency and furnished as a required contribution incident to a federal program or project.

History: En. Sec. 8, Ch. 3, 2nd Ex.
L. 1971.

93-9935. Public assistance eligibility unimpaired—tax exemption of payments. No payment received by a displaced person under this act shall be considered as income or resources for the purpose of determining the eligibility of any person for assistance under any state law or for the purposes of determining income under state tax laws.

History: En. Sec. 9, Ch. 3, 2nd Ex.
L. 1971.

93-9936. Appeal to district court from administrative determination. Any person aggrieved by final administrative determination concerning eligibility for relocation payments authorized by this act may appeal such determination to the district court of the county in which the land acquired is located.

History: En. Sec. 10, Ch. 3, 2nd Ex.
L. 1971.

93-9937. Appraisal and negotiation policies—time allowed to move—condemnation proceedings. An agency which acquires real property for a program or project for which federal financial assistance will be available to pay all or any part of the cost of such program or project shall comply with the following policies:

(1) The agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefor and such amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the agreed purchase price is paid or before there is deposited with the court, in accordance with applicable law, for the benefit of the owner, an amount not less than the approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding of such property.

(5) The construction or development of a program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available) or to move his business or farm operation without at least ninety (90) days' written notice of the date by which such move is required.

(6) If an owner or tenant is permitted to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the acquiring agency on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the time of condemnation be advanced, or negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred, or any other action coercive in nature be taken to compel an agreement on the price to be paid for the property.

(8) If an interest in real property is to be acquired by exercise of the power of eminent domain, formal condemnation proceedings shall be instituted. The acquiring agency shall not intentionally make it necessary

for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

History: En. Sec. 11, Ch. 3, 2nd Ex.
L. 1971.

93-9938. Advancement of closing costs and taxes incurred by owner. Any agency acquiring real property for a program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project shall, as soon as practicable after the date of payment of the purchase price or the date of deposit into court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, reimburse the owner, to the extent the acquiring agency deems fair and reasonable, for expenses he necessarily incurred for recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the acquiring agency; penalty costs for prepayment for any pre-existing recorded mortgage or deed of trust entered into in good faith encumbering such real property; and the prorata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring agency, or the effective date of possession of such real property by the acquiring agency, whichever is the earlier.

History: En. Sec. 12, Ch. 3, 2nd Ex.
L. 1971.

93-9939. Reimbursement of costs when condemnation proceedings abandoned. Where a condemnation proceeding is instituted by an agency to acquire real property for a program or project for which federal financial assistance is available, and the final judgment is that the real property cannot be acquired by condemnation or that the proceeding is abandoned, the owner of any right, title, or interest in such real property shall be paid such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings. The award of such sums will be paid by the agency which sought to condemn the property.

History: En. Sec. 13, Ch. 3, 2nd Ex.
L. 1971.

93-9940. Expenses included in inverse condemnation judgment or settlement. Where an inverse condemnation proceeding is instituted by the owner of any right, title, or interest in real property because of the alleged taking of his property for any program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or attorney for the acquiring agency effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the

court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

History: En. Sec. 14, Ch. 3, 2nd Ex.
L. 1971.

93-9941. Acquisition of buildings and improvements affected—payments to tenant. (1) Where any interest in real property is acquired for a program or project for which federal assistance will be available to pay all or any part of the cost of the program or project, the acquiring agency shall acquire an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which are required to be removed from such real property or which the acquiring agency determines will be adversely affected by the use to which such real property will be put.

(2) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (1) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

Payment for such buildings, structures, or improvements as set forth in this subsection (2) shall not result in duplication of any payments otherwise authorized by state law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment the tenant shall assign, transfer, and release all his right, title, and interest in and to such improvements. Nothing in this subsection (2) shall be construed to deprive the tenant of any rights to reject payment and to obtain payment for such property interests in accordance with other laws of the state.

History: En. Sec. 15, Ch. 3, 2nd Ex.
L. 1971.

93-9942. Duplication of eminent domain payments not intended. No payment or assistance provided for in this act shall be required to be made by an agency if the displaced person receives a payment required by the laws of eminent domain which is determined by the agency to have substantially the same purpose and effect as such payment under this act.

History: En. Sec. 16, Ch. 3, 2nd Ex.
L. 1971.

93-9943. New rights and powers not created. (1) The provisions of section 7 [93-9933] of this act create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation.

(2) Nothing in this act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain any element of value or damage not in existence immediately prior to the effective date of this act.

(3) Nothing in this act shall be construed as, directly or indirectly, granting any new or additional power of eminent domain.

History: En. Sec. 17, Ch. 3, 2nd Ex.
L. 1971.

93-9944. Application to all federally assisted programs. This act shall apply to all acquisitions of real property by an agency for a program or project for which federal financial assistance is available to pay all or any part of the cost.

History: En. Sec. 18, Ch. 3, 2nd Ex.
L. 1971.

CHAPTER 100—NAMES—CHANGE OF NAMES OF PERSONS —OF WATERCOURSES

Section 93-100-2. Application for change of name—how made.

93-100-2. (9964) Application for change of name—how made. All applications for change of names must be made to the district court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under eighteen (18) years of age, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name; and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific corporation, or any corporation bearing or having for its name, or using or being known by the name of, any benevolent or charitable order or society, may, by petition, apply to the district court of the county in which its articles of incorporation were originally filed, or in which the property of such corporation is situated, for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any other banking corporation or association, or of any friendly association.

History: En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1921; re-en. Sec. 9964, R. C. M. 1921; amd. Sec. 21, Ch. 240, L. 1971; amd. Sec. 33, Ch. 94, L. 1973.

Amendments

The 1971 amendment changed the age specified in the first sentence from 21 for males and 18 for females to 19 for either.

The 1973 amendment reduced the age specified in the first sentence from nineteen to eighteen years.

CHAPTER 101—BIRTH DATE—PROCEDURE FOR JUDICIAL DETERMINATION

93-101-4. Fees—certification of judgment.

Compiler's Notes

Section 105, Ch. 349, Laws 1974, substituted "department of health and en-

vironmental sciences" in this section for "bureau of vital statistics, state board of health."

CHAPTER 301—EVIDENCE—DEFINITIONS—KINDS AND DEGREES OF

93-301-4. (10491) The degree of proof required to establish facts.

Criminal Cases

Evidence that included victim's testimony corroborated by medical evidence was sufficient to support jury conviction of statutory rape. *State v. Anderson*, 156 M 122, 476 P 2d 780.

Insufficient Evidence

Where lessee alleged breach of covenant of quiet enjoyment on grounds that he had been substantially deprived of his prorata share of parking spaces in shopping center lot, his evidence in support of allegations was insufficient under this section and section 93-301-13 since it consisted only of testimony that on one occasion parking lot was full but only three tables were occupied in lessee's restau-

rant. *Joseph v. Hustad Corp.*, 153 M 121, 454 P 2d 916.

Where owner of mineral rights to property built road for access to his oil well on property owned by plaintiff and such road was alleged to have been causing plaintiff's dam and spillway to erode, jury verdict of damages for such injury was reversed, since dam and spillway had not in fact washed out and evidence did not indicate conclusively that washout was inevitable; therefore plaintiff's evidence did not preponderate in favor of findings on which it was based as provided by this section and section 93-301-13. *Hurley v. Northern Pacific R. Co.*, 153 M 199, 455 P 2d 321.

93-301-11. (10498) Prima-facie evidence defined.

Ownership of Cattle

Although under sections 46-606 and 67-308 prima facie the owners of the recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under this section. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 490.

In action by administrator of estate of deceased partner against surviving partners to recover assets transferred by deceased during his last illness, evidence that deceased had a half interest in partnership cattle and failure of defendants

to produce any of the partnership records at the trial in the lower court, sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

Statutory Rape

Prima facie case of statutory rape was established by testimony of rape victim on cross- and redirect examination that defendant had committed an act of sexual intercourse with her. *State v. Anderson*, 156 M 122, 476 P 2d 780.

93-301-13. (10500) Satisfactory evidence defined.

Insufficient Evidence

Where lessee alleged breach of covenant of quiet enjoyment on grounds that he had been substantially deprived of his prorata share of parking spaces in shopping center lot, his evidence in support of allegations was insufficient under this section and section 93-301-4 since it consisted only of testimony that on one occasion parking lot was full but only three tables were occupied in lessee's restaurant.

Joseph v. Hustad Corp., 153 M 121, 454 P 2d 916.

Where owner of mineral rights to property built road for access to his oil well on property owned by plaintiff and such road was alleged to have been causing plaintiff's dam and spillway to erode, jury verdict of damages for such injury was reversed since dam and spillway had not in fact washed out and evidence did not indicate conclusively that washout was

inevitable; therefore plaintiff's evidence did not preponderate in favor of findings on which it was based as provided by this

section and section 93-301-4. *Hurley v. Northern Pacific R. Co.*, 153 M 199, 455 P 2d 321.

CHAPTER 401—EVIDENCE—GENERAL PRINCIPLES OF

93-401-4. (10508) Witness presumed to speak the truth.

Accomplice as Witness

In a first degree burglary case the credibility of the defendant's accomplice, a convicted felon, was for the jury. *State v. Barick*, 143 M 273, 389 P 2d 170.

Credibility of Witnesses

Testimony that a truck had earlier been

observed traveling at 65 to 70 miles per hour was admissible to impeach the credibility of driver's employer, who had testified that the truck could not attain speeds higher than 35 to 38 miles per hour. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

93-401-7. (10511) Declarations which are a part of the transaction.

Res Gestae

Statements made by decedent to her neighbors to the effect that her husband had beaten her the previous evening and that morning and that she was anxious to leave the house were not part of the res gestae and not admissible in prosecution against husband for voluntary manslaughter where statements were made twelve to thirteen hours after the alleged beating and decedent died nearly 24 hours later in a hospital as a result of a subarachnoid clot caused by external

trauma. *State v. Newman*, — M —, 513 P 2d 258.

Time between Transaction and Declaration

In a negligence action by passenger of car struck by truck, testimony of truck driver concerning declarations of driver of automobile concerning speed at which he was traveling was admissible even though made some ten minutes after collision. *Blevins v. Weaver Constr. Co.*, 150 M 158, 432 P 2d 378.

93-401-9. (10513) Declaration of decedent evidence of pedigree.

References

Cited in *Bender v. Bender*, 144 M 470, 397 P 2d 957.

93-401-11. (10515) When part of the transaction proved, etc.

References

State Highway Commission v. Churchill, 146 M 52, 403 P 2d 751.

93-401-12. (10516) Contents of writing—how proved.

Duplicate Original

Carbon copy made at same time as original and with all formalities of the first sheet was a "duplicate original" and thereby properly admitted as original retail installment contract without explanation of failure to produce the ribbon copy. *Morris v. Langhausen*, 155 M 362, 472 P 2d 860.

Laboratory Test Results

In an action for damages for death of dairy cows and losses occasioned by poisoning, allowing cattle owner to testify concerning laboratory test results was not prejudicial where the testimony was brought out properly later without objection. *Hopkins v. Ravalli County Electric Cooperative, Inc.*, 144 M 161, 395 P 2d 106, 109, 12 ALR 3d 1096.

93-401-13. (10517) An agreement reduced to writing deemed the whole.

Clear Language

Parol testimony was not admissible to extend the term of a permissive easement beyond the expiration date set in a writ-

ten agreement that clearly contained no mistake, imperfection or ambiguity. *Larson v. Burnett*, 158 M 421, 492 P 2d 921. No ambiguity existed between clause

conveying one-half of the minerals in 1,040 acres and the conveyance of 520 mineral acres, so that mineral deed could not be varied by parol evidence. *Superior Oil Co. v. Vanderhoof*, 297 F Supp 1086.

Completeness of Writing

Statements made by various agency personnel in regard to continued use of defendant's office building were not admissible under parol evidence rule to alter or contradict terms of express written contract since such statements and assur-

ances did not come within any recognized exception to rule and since defendant admitted that he knew written contract would be controlling. *United States v. Willard E. Fraser Co.*, 308 F Supp 557, affirmed 459 F 2d 483.

References

State Highway Commission v. Churchwell, 146 M 52, 403 P 2d 751; *Thisted v. Country Club Tower Corp.*, 146 M 87, 405 P 2d 432.

93-401-15. (10519) Construction of statutes and instruments, etc.

Insurance Policy

Clause in disability insurance policy which provided that benefits were payable only in cases involving continuous and total disability within 30 days of date of accident preventing performance of every duty pertaining to insured's occupation, precluded recovery under policy by insured who returned to work temporarily within 30-day period and was able to do a portion of his duties since,

where language admits of only one meaning, there is no room for interpretation under the guise of ambiguity. *Nelson v. Combined Ins. Co. of America*, 155 M 105, 467 P 2d 707.

References

In re Jones' Estate, 146 M 439, 408 P 2d 482; *Wolff v. Standard Life & Accident Ins. Co.*, 147 M 460, 416 P 2d 11, 17.

93-401-17. (10521) The circumstances to be considered.

Building Lease

Statements made by various agency personnel in regard to continued use of defendant's office building were not admissible under parol evidence rule to alter or contradict terms of express written contract since such statements and assurances did not come within any recognized exception to rule and since defendant admitted that he knew written contract would be controlling. *United States v. Willard E. Fraser Co.*, 308 F Supp 557, affirmed 459 F 2d 483.

Intention of Parties

Informal written instrument stating "I wish to pay" and uncontradicted evidence that donor rejected lawyers and wanted

to give a gift established donative intent. *Faith Lutheran Retirement Home v. Veis*, 156 M 38, 473 P 2d 503.

Mineral Deed

No ambiguity existed between clause conveying one-half of the minerals in 1,040 acres and the conveyance of 520 mineral acres, so that mineral deed could not be varied by parol evidence. *Superior Oil Co. v. Vanderhoof*, 297 F Supp 1086.

References

Close v. Rueggsegger's Estate, 143 M 32, 386 P 2d 739; *Thisted v. County Club Tower Corp.*, 146 M 87, 405 P 2d 432; *Ryan v. Ald, Inc.*, 146 M 299, 406 P 2d 373.

93-401-26. (10530) Affirmative only can be proved.

Notice

Where plaintiff alleged giving of notice which defendant denied, notice or lack thereof was put in issue and plaintiff had burden of proof. *Glacier General Assurance Co. v. State Farm Mutual Automobile Ins. Co.*, 150 M 452, 436 P 2d 533.

Partial Payment

Partial payment by special deposit was

an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. *Baker Nat. Bank v. Lestar*, 153 M 45, 453 P 2d 774.

References

Colarchik v. Watkins, 144 M 17, 393 P 2d 786.

93-401-27. (10531) Facts which may be proved on trial.

Admission by Living Person

In an action by property owner against church camp for damage from fire begun

by camp counselor, letter written by counselor admitting starting fire accidentally was inadmissible as declaration against in-

terest since counselor, although unavailable to testify, was not dead within requirement of subdivision 4. MacDonald v. Protestant Episcopal Church, 150 M 332, 435 P 2d 369.

Admissions against Interest—Pleadings

Pre-trial order which limited issues to be litigated did not supersede plaintiff's original complaint to sustain trial court's ruling that defendant could not use complaint to cross-examine plaintiff concerning certain inconsistencies between plaintiff's original complaint and his testimony; although this refusal by trial court was error, it was not ground for reversal since error was "harmless." Fox v. Fifth West, Inc., 153 M 95, 454 P 2d 612.

Boundary Lines

In boundary dispute, where the monuments to the boundary of a thoroughfare were obliterated, the boundaries were properly proven by tradition, customary usage and the way in which buildings along the thoroughfare had been built. Brady v. State Highway Commission, — M —, 517 P 2d 738.

Expert Testimony

Ex-highway patrolman, who had twenty years' experience investigating automobile accidents, including determinations of speed from skidmarks and surrounding circumstances, and was skilled in use of graphs and charts used by National Safety Council and Montana Highway Patrol in connection with determining speed from skidmarks, was qualified to give expert opinion evidence as to speed of defendant's automobile, even though he had retired from highway patrol some six years previously, had first heard of accident two weeks before trial, did not measure drag

factor or coefficient of friction on particular road surface involved and, as mere highway patrolman, would not have been permitted to testify to investigation made year and one-half after accident. Graham v. Rolandson, 150 M 270, 435 P 2d 263.

Qualification by Practical Experience

Trial court did not err by permitting fire marshal to testify as expert witness on possible or probable cause of fire where fire marshal had served seventeen years as a fireman, had attended six seminars on fire and arson investigation, had completed another 100-hour fire and arson investigation course, had assisted in planning a state arson school, all of which studies encompassed the subjects of fire investigation, arson, explosions, evidence, interviewing witnesses, photography, collection and preservation of evidence and determination of origin of fires. Haynes v. County of Missoula, — M —, 517 P 2d 370.

Res Gestae

Statements made by decedent to her neighbors to the effect that her husband had beaten her the previous evening and that morning and that she was anxious to leave the house were not admissible under the "dying declarations" exception in prosecution against husband for voluntary manslaughter where decedent died nearly 24 hours later in a hospital as a result of a subarachnoid clot caused by external trauma. State v. Newman, — M —, 513 P 2d 258.

References

Cited in Bender v. Bender, 144 M 470, 397 P 2d 957; McReynolds v. McReynolds, 147 M 476, 414 P 2d 531.

CHAPTER 501—EVIDENCE—JUDICIAL NOTICE OF FACTS AND FOREIGN LAWS

93-501-1. (10532) Certain facts of general notoriety assumed to be, etc.

Actual Knowledge

The burden of proof is on the individual litigant, and the courts are not required by the doctrine of judicial notice to inform themselves of facts not within the actual knowledge of the court, nor need the courts take judicial notice of a fact or facts when the party desiring such notice does not request it. Holtz v. Babcock, 143 M 341, 389 P 2d 869, 390 P 2d 801.

Judicial Acts and Records

Probate judge, in determining distribution of estate, has power to determine circumstances of decedent's death and in

doing so properly took notice under subdivision 2 of this section of wife's conviction of manslaughter in death of her husband. Sikora v. Sikora, — M —, 499 P 2d 808.

Succession to Office

The court took notice that upon his death the governor was succeeded as provided by law. Holtz v. Babcock, 143 M 341, 389 P 2d 869, 390 P 2d 801.

References

Rambur v. Diehl Lumber Co., 144 M 84, 394 P 2d 745, 749; State v. Peters, 146 M 188, 405 P 2d 642.

CHAPTER 701—EVIDENCE—WITNESSES

Section 93-701-4. Persons in certain relations cannot be examined.

93-701-1. (10533) Witness defined.

References

State v. Barick, 143 M 273, 389 P 2d 170.

93-701-2. (10534) All persons capable of perceptions, etc.

Felony Conviction

An accomplice may testify in a criminal case even though he is a convicted felon

at the time of his testimony. State v. Barick, 143 M 273, 389 P 2d 170.

93-701-3. (10535) Persons who cannot be witnesses.

Deceased Agent—Injustice Prevented

Before a witness who is barred by subdivision 4 will be allowed to testify to prevent an injustice, a foundation must be laid by the introduction of other evidence which shows that in all probability the proponent had a meritorious cause of action. Johnson v. Mommoth Lode & Uranium Exploration Corp., 136 M 420, 348 P 2d 267.

ship, that the witness had willed his entire estate to the deceased, and the witness and the deceased had intended for the proceeds of the sale of the partnership to be in joint tenancy with right of survivorship and that this was evidenced by an escrow receipt instructing payment of proceeds to a jointly held bank account. Hansen v. Kiernan, 159 M 448, 499 P 2d 787.

Decedents' Estates—Injustice Prevented

District court did not abuse its discretion in allowing a witness otherwise barred under subdivision 3 to testify as to agreement with partner for mutual wills as against intestate heirs of deceased partner, upon showing that the witness and the deceased held saving accounts, corporate stock, and residence in joint tenancy with right of survivorship, that the witness and the deceased had had a lifelong association and successful partnership under both oral agreement and written articles of copartner-

Decedent's Estates—Written Communications

Trial court's finding based upon oral testimony concerning terms of contract executed by deceased was error since such oral testimony, varying terms of written contract, was inadmissible under this section. Davison v. Casebolt, 154 M 125, 461 P 2d 2.

References

State v. Barick, 143 M 273, 389 P 2d 170.

93-701-4. (10536) Persons in certain relations cannot be examined. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. to 6. * * * [Same as parent volume.]

7. A counselor, psychologist, nurse, or teacher, employed by any educational institution, cannot be examined as to communications made to him in confidence by a duly registered student of such institution, provided however, that this provision shall not apply where consent has been given by the student, if not a minor, or if he is a minor, by the student and his parent or legal guardian.

8. A publisher, editor, reporter or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot without his consent be examined as to any communication made to him in confi-

dence for the purpose of proper publication nor shall he be adjudged in contempt by a court, the legislature or any administrative body for refusing to disclose the source of any information procured while so connected or employed for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, without his consent be examined as to any communication made to him in confidence for the purpose of proper publication nor shall he be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television.

History: Ap. p. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973.

Amendments

- The 1971 amendment added subdivision 7.
The 1973 amendment added subdivision 8.

Attorney and Client

Opinions of house counsel rendered to an employer were entitled to the attorney-client privilege, and where portions of them had been disclosed in camera, the client was entitled to a protective order preventing their further disclosure or use in pleadings by the opponent. State ex

rel. Union Oil Co. of California v. District Court, — M —, 503 P 2d 1008.

Husband and Wife

Section 95-3011, rather than subdivision (1) of this section, was applicable in determining existence of marital privilege in homicide prosecution, State v. Taylor, — M —, 515 P 2d 695.

Physician and Patient

The physician-patient privilege under subsection 4 of this section is not available to a defendant in a criminal action since the provision in section 94-7209 (now 95-3001) incorporating the civil rules of evidence into the criminal law "except as otherwise provided" pertains to the language of subsection 4 which specifically limits the privilege to civil actions. State v. Campbell, 146 M 251, 405 P 2d 978, 22 ALR 3d 824.

References

State v. Barick, 143 M 273, 389 P 2d 170.

CHAPTER 801—EVIDENCE—UNIFORM BUSINESS RECORDS AS EVIDENCE ACT—UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

Section 93-801-5. Reproductions of originals.

93-801-1. "Business" defined.

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have

adopted the Uniform Business Records as Evidence Act: Connecticut, Michigan, and Rhode Island.

93-801-2. Proof of business records.

Accuracy of Records

In first degree murder trial, transcript of tape-recorded statement by defendant was not admissible as business record where no one testified as to the accuracy of the transcription and tapes were either lost or destroyed sometime between the time of the taking of the statement and

the time of the trial. State v. Warwick, 158 M 531, 494 P 2d 627.

Medical Records

Medical testimony based on information acquired from outside sources, including examinations by other doctors, nurse's notes and observation, X-rays,

and other tools of the profession used in making a diagnosis is admissible if part of the case file, *Klaus v. Hillberry*, 157 M 277, 485 P 2d 54.

Suicide Note

Suicide note written by stockbroker of decedent which stated that the stockbroker had, over a course of years, misappropriated large amounts of stock

certificates entrusted to him, was admissible to show that securities had been stolen prior to decedent's death and that such securities were not an "asset" for which the executor could be held responsible in an action instituted by beneficiary of decedent's estate alleging that executor had negligently failed to collect assets of decedent. In re Estate of Schueren, — M —, 512 P 2d 1283.

93-801-5. Reproductions of originals. If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence, if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

History: En. Sec. 1, Ch. 100, L. 1953; amd. Sec. 1, Ch. 160, L. 1969.

Amendments

The 1969 amendment deleted a limitation in the first sentence that original may be destroyed unless "held in a custodial or fiduciary capacity."

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act: Arkansas, Delaware, Michigan, and West Virginia.

CHAPTER 901—EVIDENCE—UNIFORM OFFICIAL REPORTS AS EVIDENCE ACT

93-901-1. Official reports admissible as evidence.

NOTE.—Uniform State Law. Sections 93-901-1 through 93-901-5 constitute the "Uniform Official Reports as Evidence Act" approved by the National Conference of Commissioners on Uniform State Laws in 1936 and adopted in various forms in Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Ken-

tucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, Wyoming, and also in the Virgin Islands.

CHAPTER 1001—EVIDENCE—PUBLIC WRITINGS

93-1001-9. (10547) Constitution and statutes.

References

State ex rel. Peery v. District Court, 145 M 287, 400 P 2d 648.

93-1001-19. (10557) Copy of a foreign record—when evidence.**References**

In re Hosova's Estate, 143 M 75, 387 P 2d 305.

93-1001-23. (10561) What deemed adjudged in a judgment.**Collateral Estoppel**

Buyers of land under contract for deed were not estopped from bringing an action to establish beneficial ownership of water rights and water stock under the contract for deed by virtue of having brought a prior action for specific performance of the contract where the district court, in the first case, refused

to adjudicate the water rights as an issue which was beyond the scope of the controversy presented to it; failure to take an appeal from the trial court's denial to decide the controversy in the prior case did not effect a judicial determination of the controversy. *Schwend v. Jones*, — M —, 515 P 2d 89.

93-1001-30. (10568) Manner of proving other official documents.**References**

Holtz v. Babcock, 143 M 341, 390 P 2d 801.

CHAPTER 1101—EVIDENCE—PRIVATE WRITINGS

93-1101-9. (10585) Original writing to be proved or accounted for.**Duplicate Original**

Carbon copy made at same time as original and with all formalities of the first sheet was a "duplicate original" and thereby properly admitted as original re-

tail installment contract without explanation of failure to produce the ribbon copy. *Morris v. Langhausen*, 155 M 362, 472 P 2d 860.

93-1101-17. (10594) Entries of decedents evidence in specified cases.**Suicide Note**

Suicide note written by stockbroker of decedent which stated that the stockbroker had, over a course of years, misappropriated large amounts of stock certificates entrusted to him, was admissible to show that securities had been stolen prior to decedent's death and that

such securities were not an "asset" for which the executor could be held responsible in an action instituted by beneficiary of decedent's estate alleging that executor had negligently failed to collect assets of decedent. In re Estate of *Schueren*, — M —, 512 P 2d 1283.

CHAPTER 1301—EVIDENCE—INDIRECT—INFERENCES
AND PRESUMPTIONS**93-1301-1. (10600) Indirect evidence classified.****Presumption Regarding Sentencing**

Presumption that first offender under Dangerous Drug Act is entitled to de-

layed imposition of sentence is kind of indirect evidence under this section. *State v. Simtob*, 154 M 286, 462 P 2d 873.

93-1301-2. (10601) Inference defined.**Inference Distinguished from Suspicion**

An inference is to be distinguished from mere suspicion which is "the act or an instance of suspecting; imagination or apprehension of something wrong or hurt-

ful without proof or on slight evidence" (quoting Webster's New International Dictionary, 3rd ed. 1961). *State v. Barick*, 143 M 273, 389 P 2d 170.

93-1301-3. (10602) Presumption defined.**Presumption Regarding Sentencing**

Presumption regarding sentencing under Dangerous Drug Act "is a deduction which the law expressly directs to be made from particular facts." *State v. Simtob*, 154 M 286, 462 P 2d 873.

References

State v. Barick, 143 M 273, 389 P 2d 170.

93-1301-4. (10603) When an inference arises.**References**

State v. Barick, 143 M 273, 389 P 2d 170.

93-1301-5. (10604) Presumptions may be converted, when.**Adverse Possession**

Although this section provides that presumptions may be overcome by other evidence, presumption of adverse possession was not overcome by evidence showing

acquiescence since acquiescence did not amount to permissive use or license. *O'Connor v. Brodie*, 153 M 129, 454 P 2d 920.

93-1301-6. (10605) Specification of conclusive presumptions.**Acts Constituting Estoppel**

Director of closely held corporation who was obligated to sell his shares back to the corporation pursuant to repurchase agreement was estopped to deny his acquiescence to the terms of the sale by virtue of his response to telephone calls indicating his willingness to sell the shares and requesting the proceeds to be paid to his creditors with the remaining balance to himself, by virtue of the corporate officer's testimony that the director knew of the board of directors' resolution to exercise their option to purchase his stock at fifty per cent of its book value, by virtue of the director's conduct which led the corporation to believe the consent to purchase would be signed and by virtue of the director's failure to object to the proceedings of the corporation in enacting the resolution calling for the repurchase of his stock, which actions resulted in the failure of the corporation to call a meeting of the board of directors within the period during which the corporation's right to repurchase the stock could have been properly exercised. *State ex rel. Howeth v. D. A. Davidson & Co.*, — M —, 517 P 2d 722.

Deed from Mother to Son

Conclusive presumption was not established in situation where court refused to impose constructive trust upon lands deeded to son by aged mother. *Bodine v. Bodine*, 149 M 29, 422 P 2d 650.

Estoppel by Own Acts

The doctrine of equitable estoppel set forth in subdivision 3 of this section is not available as a defense when the essential elements of estoppel are lacking. *Belhumeur v. Dawson*, 229 F Supp 78, 86.

Lessors of mineral rights were not estopped from denying validity of lease by lessee's contention that lessors led him to believe that previous lease had expired by showing him a "notice" of breach sent to previous lessee where lessee actually relied upon county records and was aware of the prior lease of record covering the same land. *Christian v. A. A. Oil Corp.*, — M —, 506 P 2d 1369.

Legitimacy

Child is presumed legitimate if mother and father were married. *Spradlin v. United States*, 262 F Supp 502.

93-1301-7. (10606) All other presumptions may be controverted.**Controversion of Presumption**

Presumption that first offender under Dangerous Drug Act is entitled to delayed imposition of sentence is disputable and may be controverted by other evidence but controls unless so contradicted. *State v. Simtob*, 154 M 286, 462 P 2d 873.

Subdivision 4

Deceased was presumed to have taken ordinary care of his own concerns, however plaintiff's evidence in wrongful death action showing deceased's failure to properly test empty gasoline tank before welding it which could very well have been cause of accident contradicted presumpt-

tion. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

Subdivision 15

Statutory presumption that "official duty has been regularly performed" was not overcome where defendant offered no evidence to show that any prospective juror was improperly excused from service and where judge testified that no prospective juror was excused from service without valid statutory excuse. *State v. Corliss*, 150 M 40, 430 P 2d 632.

On basis of statutory presumption and on basis of testimony of county employee that he had been ordered to maintain road by county commissioner who was also owner of the land, court concluded that then owner of land regarded road as public highway, in determining that public highway had been established by prescriptive use. *Kostbade v. Metier*, 150 M 139, 432 P 2d 382.

Findings and conclusions of district court are presumed correct and will not be reversed on appeal unless evidence, even though conflicting, preponderates against them. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

Statutory presumption in subdivision 15 imposed a heavy burden upon party attacking bank superintendent's order permitting establishment of another bank in a community, and where superintendent made a thorough investigation, secured opposing views, and considered all evidence, including some confidential evidence as to economic prospects within the community, the evidence that he acted within his discretionary powers was so great as to support a summary judgment denying injunction or prohibition against the superintendent's action. *Miners & Merchants Bank v. Dowdall*, 158 M 142, 489 P 2d 1274.

Statutory presumption of correctness of secretary of state's certification as to total number of electors voting at election on new constitution was overcome by demonstrable fact, apparent from other figures in his certificate, that not that many electors cast valid votes on either side of the question. *State ex rel. Cashmore v. Anderson*, — M —, 500 P 2d 921, certiorari denied 410 US 931.

Where petitioner claimed, fourteen years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, but he had counsel to represent him on a second charge brought against him a few days later, presumption that petitioner had voluntarily waived right to counsel on the first charge, besides the fact that he had pleaded guilty to it so that confession was not used against him, reinforced presumption that the proceedings had not violated

his constitutional rights. *Frost v. State of Montana*, 249 F Supp 349.

Subdivision 17

Absent proof that evidence at hearing on entry of default judgment was insufficient or that an erroneous standard of damages was used, presumption that judgment was correct controlled on appeal, and aggrieved party could not attack evidence on which default judgment was based by introducing evidence in support of his proposed defense at hearing on his motion to vacate default judgment. *Uffleman v. Labbit*, 152 M 238, 448 P 2d 690.

Where petitioner claimed, fourteen years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, fact that defendant had pleaded guilty to the crime charged so that confession was not used, and record stated he had waived right to counsel reinforced presumption under this subdivision that defendant's constitutional rights to counsel and against self-incrimination had not been violated. *Frost v. State of Montana*, 249 F Supp 349.

Subdivision 18

Presumption was not overcome where jury found in favor of defendant on his counterclaim filed in response to plaintiff's action for negligence from which may be inferred fact that issue of defendant's negligence was before the jury and that in not finding for plaintiff jury concluded that defendant was not negligent. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

Subdivision 24

Presumption under this section that condemnee had received revised contract from state was strengthened by facts that condemnee received other documents enclosed in the same envelope, the envelope was not returned to the state office and the condemnee was well-known in the vicinity. *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

Testimony that notice was signed, placed in properly addressed envelope with sufficient postage thereon and mailed by certified mail was sufficient foundation for district court to admit original document into evidence and make finding that required notice was given. *Treasure State Industries, Inc. v. Leigland*, 151 M 288, 443 P 2d 22.

Fact that letter addressed to county department of public welfare was mailed does not establish when it was received or that it was received by a responsible official. *Application of Hendrickson*, 159 M 217, 496 P 2d 1115.

Subdivision 30

Evidence that man and woman exchanged wedding rings, mutually declared their marriage, and thereafter openly lived together, supported finding that they were married. *Estate of Swanson*, — M —, 502 P 2d 33, distinguished in 509 P 2d 293, 295.

In view of statute recognizing common-law marriage, presumption that man and woman deporting themselves as husband and wife have entered into lawful contract of marriage is itself proof of marriage and is overcome as matter of law only when in light of proved facts reasonable men could no longer find in accordance with presumed fact. *Spradlin v. United States*, 262 F Supp 502.

Presumption of valid common-law marriage may be overcome if divorce records from the residences of alleged common-law husband reveal that he was not di-

vorced from former wife or had not had former marriage annulled. *Spradlin v. United States*, 284 F Supp 763.

Subdivision 33

Findings and conclusions of district court are presumed correct and will not be reversed on appeal unless the evidence, even though conflicting, preponderates against them. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

References

Subdivision 15: *Tooker v. State*, 147 M 207, 410 P 2d 923; *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

Subdivision 16: *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

Subdivision 17: *Tooker v. State*, 147 M 207, 410 P 2d 923; *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

CHAPTER 1401—EVIDENCE—INDISPENSABLE—UNWRITTEN AGREEMENTS—CONCLUSIVE—UNANSWERABLE

93-1401-7. (10613) Agreement not in writing—when invalid.

Estoppel from Raising Statute

Promisor was estopped from raising statute of frauds as defense to action on oral agreement on basis of evidence of glaring inconsistencies in promisor's position. *Daley v. Daley*, 150 M 432, 436 P 2d 88.

Note or Memorandum

While the statute of frauds does not require that the memorandum be contained in a single document, where a memorandum did not name the parties to the alleged contract but referred to them as "we" and "our" and also tended to show that further negotiations were intended by the parties, it was not sufficient to satisfy the statute. *Anderson v. KFBB Broadcasting Corp.*, 143 M 423, 391 P 2d 2, distinguished in *Daley v. Daley*, 150 M 432, 436 P 2d 88.

Part Performance

Where employer had been awarded

construction contract to be completed in 360 days and hired employee under oral agreement almost immediately thereafter, fact that contract was later amended resulting in an extension of time to correct construction error did not make it invalid under this section, and therefore did not affect employee's right to recover salary upon being fired, since extension of time was not contemplated in the original contract; fact that employee had worked seven weeks also removed contract from bar of statute under doctrine of part performance. *Fox v. Fifth West, Inc.*, 153 M 95, 454 P 2d 612.

Buyer's tender of payment and a conveyance to be executed by seller did not constitute such performance or memorandum as to take an oral agreement to sell land out of the operation of this section, where seller did not accept the tender or execute the conveyance. *Myers v. Bendewald*, — M —, 502 P 2d 412.

CHAPTER 1501—EVIDENCE—PRODUCTION OF—SUBPOENAS

93-1501-1. (10616) Evidence to be produced, by whom.

Burden of Proof

Plaintiff had burden of proof that disputed range rights were based on land other than that purchased jointly by plaintiff and defendant and failure so to prove defeated plaintiff's claim that defendants were not entitled to one-half the

appraised value of the range rights. *Watson v. Barnard*, 155 M 75, 469 P 2d 539.

Negligence

Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to come

forth with sufficient evidence to show the lack of due care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

Where plaintiff alleged giving of notice which defendant denied, notice or lack thereof was put in issue and plaintiff had burden of proof. *Glacier General Assurance Co. v. State Farm Mutual Automobile Ins. Co.*, 150 M 452, 436 P 2d 533.

Partial Payment

Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that

burden of proof required that it be shown that payment was made on the particular obligation in controversy. *Baker Nat. Bank v. Lestar*, 153 M 45, 453 P 2d 774.

Res Ipsa Loquitur

Res ipsa loquitur does not relieve the plaintiff of the burden of proving actionable negligence, nor is it sufficient that he show that he was injured and that the instrumentality which caused his injury was in the control of the defendant; he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

CHAPTER 1901—EVIDENCE—GENERAL RULES OF EXAMINATION

93-1901-2. (10660) Witness not under examination may be excluded.

Ignorance of Order

Fact that witness did not hear court's order to absent himself from courtroom and, although present during part of another witness's testimony, was allowed to testify, was not reversible error in absence of showing that defendant was prejudiced. *State v. Love*, 151 M 190, 440 P 2d 275.

Officers As Witnesses

Statute does not apply to police officers called as state's witnesses, so that court properly denied defendant's motion to exclude police officers from courtroom before their time to testify. *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

93-1901-6. (10664) When witness may refresh memory from notes.

Pretrial Statement

Trial court did not abuse its discretion in permitting state's witness to testify after he had refreshed memory by referring to a statement he had made after shooting incident, in absence of prejudice to defendant and in light of fact that witness acknowledged that he made statement after incident, that he recognized statement and that signature on statement was his. *State v. Gallagher*, 151 M 501, 445 P 2d 45.

Recitals in Instrument

Allowing investigating officer who was testifying at trial to read directly from copy of police report he had prepared was not error where officer relied upon report in order to testify with greater accuracy regarding defendant's admission of guilt. *State v. LaFreniere*, — M —, 515 P 2d 76.

References

State v. Jones, 143 M 155, 387 P 2d 913.

93-1901-7. (10665) Cross-examination, as to what.

Prior Inconsistent Pleading

Complaint filed in previous action by father alleging boy's leg was 75% permanently disabled, signed under oath by

father, was properly admitted on cross-examination of father who had previously testified otherwise. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

93-1901-11. (10668) How impeached.

Contradictory Evidence

Employer's testimony that a truck could not be driven more than 35 to 38 miles per hour could be impeached by testimony that witness had, on a prior occasion, seen the truck traveling at 65 to 70 miles per hour. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

After defendant testified that over the past six years he had "only" been picked

up five or six times for driving while his license was suspended, prosecution could properly show the remainder of his record, which included fifteen apprehensions for driving without a license, twelve speeding charges, six violations of basic rule, one display of a fictitious driving license, one improper lane usage, and two excessive muffler noise charges. *State v. Deshner* 158 M 188, 489 P 2d 1290.

Criminal Defendant Impeached

Enactment of subsection 95-1506(b) providing that notice and charges of prior convictions for purpose of enhancing sentence shall not be made known to the jury before return of verdict did not change any law relative to use of defendant's record to impeach his testi-

mony should he decide to testify in his own behalf. *State v. Romero*, — M —, 505 P 2d 1207.

References

State v. Tagge, 143 M 289, 388 P 2d 792; *State v. Tully*, 148 M 166, 418 P 2d 549, 550.

93-1901-12. (10669) Impeachment by evidence of declarations.**Prior Inconsistent Pleading**

Complaint filed in previous action by father alleging that boy's leg was 75% permanently disabled, signed by father under oath, was properly admitted for purpose of impeaching father who had previously testified otherwise. *Tigh v.*

College Park Realty Co., 149 M 358, 427 P 2d 57.

References

State v. Lagge, 143 M 289, 388 P 2d 792.

93-1901-13. (10670) Evidence of good character—when allowed.**Constructive Fraud**

In action for damages by purchasers of land against sellers and their real estate agent, based on a theory of constructive fraud, the character of the defendants was

not in issue and trial court's limitation of number of character witnesses was not prejudicial to defendant. *Goggans v. Winkley*, 159 M 85, 495 P 2d 594.

93-1901-14. (10671) Writing shown to witness may be inspected, etc.**Pretrial Statement of Defendant**

The trial court did not err in permitting state's witness to read entire statement of defendant wherein defendant was warned of constitutional rights since it was mate-

rial evidence that defendant's constitutional rights and waiver thereof were clearly and understandably enunciated to defendant. *State v. Lucero*, 151 M 531, 445 P 2d 731.

CHAPTER 2001—EVIDENCE—EFFECT OF**93-2001-1. (10672) Jury judges of effect of evidence, etc.****Subdivision 3**

Conviction would not be reversed for giving of instruction based on statute but including words "except in so far as it may be corroborated by other and credible evidence in the case," in absence of specific showing of prejudice. *State v. Rollins*, 149 M 481, 428 P 2d 462.

Subdivision 4—Accomplice's Testimony

Where the court gave a defendant's instruction quoting this section verbatim in a criminal case, it may be assumed that the instruction was considered by the jury in weighing the evidence. *State v. Barick*, 143 M 273, 389 P 2d 170.

Subdivisions 6 and 7

In action by administrator of estate

of deceased partner against surviving partners to recover assets transferred by the deceased during his last illness, evidence that deceased had a half interest in the partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court, sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

References

State v. Lagge, 143 M 289, 388 P 2d 792; *State v. Romero*, 146 M 77, 404 P 2d 500.

CHAPTER 2201—EVIDENCE—RULES IN PARTICULAR CASES

Section 93-2201-7. Settlement of claims—legislative policy.

93-2201-8. "Person" defined.

93-2201-9. Voluntary partial payment of claim not an admission of fault, waiver or release.

93-2201-10. Parts of act not severable.

93-2201-1. (10680) An offer equivalent to tender.**References**

Schultz v. Campbell, 147 M 439, 413 P 2d 879.

93-2201-3. (10682) Objections to tender must be specified.**Acts Constituting Waiver**

Party who was obligated to sell shares of stock under repurchase agreement waived objections to tender by failing to object to terms of tender, conduct evidencing his willingness to sell and requesting a change in payment terms. State ex rel. Howeth v. D. A. Davidson & Co., — M —, 517 P 2d 722.

Waiver of Tender

Ordinarily, a check is not a tender, but it may be as effective as a tender of currency if there is no timely objection to the form of tender, or if the objection is waived. Schultz v. Campbell, 147 M 439, 413 P 2d 879.

93-2201-4. (10683) Rules for construing description of lands.**Monuments Paramount**

A resurvey which paid no attention to artificial monuments relied upon in deeds and used by the owners of the property could not disrupt or change existing property lines. Buckley v. Laird, 158 M 483, 493 P 2d 1070.

Order of Survey

Trial court properly ordered survey of land allegedly subject to an easement where the description of the land subject to the easement was defective but could be determined pursuant to subsections 2 and 6 of this section. City of Missoula v. Rose, — M —, 519 P 2d 146.

93-2201-7. Settlement of claims—legislative policy. The legislative assembly hereby declares that the health, welfare and safety of the people of the state of Montana would be enhanced by the expeditious handling of liability claims. The legislative assembly further declares that the handling of such claims would be expedited if voluntary payment by or on behalf of one person to or on behalf of a person who has sustained injury to his person or damage to his property could not be construed as an admission of fault or liability as to any claim arising out of the occurrence which gave rise to such injury or damage.

History: En. Sec. 1, Ch. 222, L. 1973.

Title of Act

An act to provide for the voluntary pay-

ment of personal injury or property damage claims without such payment constituting an admission of liability.

93-2201-8. "Person" defined. As used in this act, the word "person" includes any individual, partnership, joint venture, unincorporated association, private or municipal corporation, the state and its political subdivisions.

History: En. Sec. 2, Ch. 222, L. 1973.

93-2201-9. Voluntary partial payment of claim not an admission of fault, waiver or release. No voluntary partial payment of a claim against any person based on alleged liability of that person for injury to person, including death, or damage to property arising out of any occurrence shall be construed as an admission of fault or liability, or as a waiver or release of claim by the person to whom or in whose behalf such payment was made. No voluntary partial payment shall be construed to reduce the amount of damages which may be pleaded or proved in any action arising

out of such occurrence. The fact of any such voluntary payment, or its amount, shall not be admissible as evidence on the trial of any action arising out of such occurrence, whether on the issue of liability, the extent of the damage or otherwise. Upon final settlement between the parties of a claim arising out of such occurrence, the parties may make any agreement they wish with respect to all voluntary partial payments. After entry of a judgment in an action for damages for personal injuries, including death, or for damage to property arising out of any occurrence, any voluntary partial payment theretofore made shall be treated as a credit against such judgment, and shall be deductible from the amount of such judgment. If after partial voluntary payments are made as herein provided for, it shall be determined by a court of competent jurisdiction that the person who made such payments, or on whose behalf such payments were made, is liable for an amount which is less than the amount of the voluntary payments already made, such person shall have no right of action for the recovery of the amount by which the voluntary payments exceeded the amount of the judgment.

History: En. Sec. 3, Ch. 222, L. 1973.

93-2201-10. Parts of act not severable. It is the intent of the legislative assembly that each part of this act is essentially dependent upon every other part, and if one part is held unconstitutional or invalid, all other parts are invalid.

History: En. Sec. 4, Ch. 222, L. 1973.

CHAPTER 2501—QUESTIONS OF FACT AND LAW—DECISION OF

93-2501-2. (10699) Questions of law addressed to the court.

Interpretation of Lease

Interpretation of lease of building was matter for court in dispute between lessor and lessee. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

CHAPTER 2601—REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

- Section 93-2601-41. Purposes.
- 93-2601-42. Definitions.
- 93-2601-43. Remedies additional to those now existing.
- 93-2601-44. Extent of duties of support.
- 93-2601-45. Interstate rendition.
- 93-2601-46. Conditions of interstate rendition.
- 93-2601-47. Choice of law.
- 93-2601-48. Remedies of state or political subdivision furnishing support.
- 93-2601-49. How duties of support enforced.
- 93-2601-50. Jurisdiction.
- 93-2601-51. Contents and filing of petition for support—venue.
- 93-2601-52. Officials to represent obligee.
- 93-2601-53. Petition for a minor.
- 93-2601-54. Duty of initiating court.
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- 93-2601-56. Jurisdiction by arrest.
- 93-2601-57. State information agency.
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- 93-2601-60. Hearing and continuance.
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- 93-2601-62. Evidence of husband and wife.
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- 93-2601-64. Order of support.
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- 93-2601-66. Additional powers of responding court.
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- 93-2601-70. Proceedings not to be stayed.
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- 93-2601-74. Appeals.
- 93-2601-75. Additional remedies.
- 93-2601-76. Registration.
- 93-2601-77. Registry of foreign support orders.
- 93-2601-78. Official to represent obligee.
- 93-2601-79. Registration procedure—notice.
- 93-2601-80. Effect of registration—enforcement procedure.
- 93-2601-81. Uniformity of interpretation.
- 93-2601-82. Short title.

93-2601-1 to 93-2601-40. Repealed.

Repeal

Sections 93-2601-1 to 93-2601-40 (Sec. 1, Ch. 208, L. 1961), known as the "Uni-

form Reciprocal Enforcement of Support Act," were repealed by Sec. 44, Ch. 237, Laws 1969.

93-2601-41. Purposes. The purposes of this act are to improve and extend by reciprocal legislation the enforcement of duties of support.

History: En. Sec. 1, Ch. 237, L. 1969.

Compiler's Notes

Section 93-2601-41 to 93-2601-44 comprise Part I of this chapter, as enacted by Ch. 237, Laws 1969, entitled "General provisions."

NOTE.—The following states have enacted the Revised Uniform Reciprocal Enforcement of Support Act: Arizona, Idaho, Illinois, Kansas, Nevada, New Mexico, North Dakota, Wisconsin.

Title of Act

An act adopting the Uniform Reciprocal Enforcement of Support Act as revised by

the National Conference of Commissioners on Uniform State Laws in 1968; providing additional remedies for enforcement of duties of support; providing for criminal enforcement by extradition; providing for civil enforcement where parties reside in different states or in different counties of Montana; providing for registration and enforcement of foreign support orders and support orders issued in different counties of Montana; providing for the resolution of paternity and visitation rights if contested, and for appeals; and repealing sections 93-2601-1 through 93-2601-40, R. C. M. 1947.

93-2601-42. Definitions. (a) "Court" means the district court of this state and when the context requires means the court of any other state as defined in a substantially similar reciprocal law.

(b) "Duty of support" means a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid.

(c) "Governor" includes any person performing the functions of governor or the executive authority of any state covered by this act.

(d) "Initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced. "Initiating court" means the court in which a proceeding is commenced.

(e) "Law" includes both common and statutory law.

(f) "Obligee" means a person including a state or political subdivision to whom a duty of support is owed or a person including a state or political subdivision that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order. It is immaterial if the person to whom a duty of support is owed is a recipient of public assistance.

(g) "Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.

(h) "Prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person.

(i) "Register" means to file in the registry of foreign support orders.

(j) "Registering court" means any court of this state in which a support order of a rendering state is registered.

(k) "Rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state.

(l) "Responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced. "Responding court" means the court in which the responsive proceeding is commenced.

(m) "State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect.

(n) "Support order" means any judgment, decree, or order of support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

History: En Sec. 2, Ch. 237, L. 1969.

93-2601-43. Remedies additional to those now existing. The remedies herein provided are in addition to and not in substitution for any other remedies.

History: En. Sec. 3, Ch. 237, L. 1969.

93-2601-44. Extent of duties of support. Duties of support arising under the law of this state, when applicable under section 7 [93-2601-47], bind the obligor present in this state regardless of the presence or residence of the obligee.

History: En. Sec. 4, Ch. 237, L. 1969.

93-2601-45. Interstate rendition. The governor of this state may

(1) demand of the governor of another state the surrender of a person found in that state who is charged criminally in this state with failing to provide for the support of any person; or

(2) surrender on demand by the governor of another state a person found in this state who is charged criminally in that state with failing to provide for the support of any person. Provisions for extradition of criminals not inconsistent with this act apply to the demand even if the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and has not fled therefrom. The demand, the oath, and any proceedings for extradition pursuant to this section need not state or show that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding state.

History: En. Sec. 5, Ch. 237, L. 1969.

prise Part II of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Criminal enforcement."

Compiler's Notes

Sections 93-2601-45 and 93-2601-46 com-

93-2601-46. Conditions of interstate rendition. (a) Before making the demand upon the governor of another state for the surrender of a person charged criminally in this state with failing to provide for the support of a person, the governor of this state may require any prosecuting attorney of this state to satisfy him that at least sixty (60) days prior thereto the obligee initiated proceedings for support under this act or that any proceeding would be of no avail.

(b) If, under a substantially similar act, the governor of another state makes a demand upon the governor of this state for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the governor may require any prosecuting attorney to investigate the demand and to report to him whether proceedings for support have been initiated or would be effective. If it appears to the governor that a proceeding would be effective but has not been initiated he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If proceedings have been initiated and the person demanded has prevailed therein the governor may decline to honor the demand. If the obligee prevailed and the person demanded is subject to a support order, the governor may decline to honor the demand if the person demanded is complying with the support order.

History: En. Sec. 6, Ch. 237, L. 1969.

93-2601-47. Choice of law. Duties of support applicable under this act are those imposed under the laws of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

History: En. Sec. 7, Ch. 237, L. 1969.

prise Part III of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Civil enforcement."

Compiler's Notes

Sections 93-2601-47 to 93-2601-74 com-

93-2601-48. Remedies of state or political subdivision furnishing support. If a state or a political subdivision furnishes support to an individual obligee it has the same right to initiate a proceeding under this act as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support.

History: En. Sec. 8, Ch. 237, L. 1969.

93-2601-49. How duties of support enforced. All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this act including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

History: En. Sec. 9, Ch. 237, L. 1969.

93-2601-50. Jurisdiction. Jurisdiction of any proceeding under this act is vested in the district court.

History: En. Sec. 10, Ch. 237, L. 1969.

93-2601-51. Contents and filing of petition for support—venue. (a) The petition shall be verified and shall state the name and, so far as known to the obligee, the address and circumstances of the obligor and the persons for whom support is sought, and all other pertinent information. The obligee may include in or attach to the petition any information which may help in locating or identifying the obligor including a photograph of the obligor, a description of any distinguishing marks on his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, and his social security number.

(b) The petition may be filed in the appropriate court of any state in which the obligee resides. The court shall not decline or refuse to accept and forward the petition on the ground that it should be filed with some other court of this or any other state where there is pending another action for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody between the same parties or where another court has already issued a support order in some other proceeding and has retained jurisdiction for its enforcement.

History: En. Sec. 11, Ch. 237, L. 1969.

93-2601-52. Officials to represent obligee. If this state is acting as an initiating state the prosecuting attorney upon the request of the court, a state department of welfare, a county commissioner, or other local welfare officer, shall represent the obligee in any proceeding under this act. If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

History: En. Sec. 12, Ch. 237, L. 1969.

93-2601-53. Petition for a minor. A petition on behalf of a minor obligee may be executed and filed by a person having legal custody of the minor without appointment as guardian ad litem.

History: En. Sec. 13, Ch. 237, L. 1969.

93-2601-54. Duty of initiating court. If the initiating court finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property it shall so certify and cause three (3) copies of the petition and its certificate and one (1) copy of this act to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court.

History: En. Sec. 14, Ch. 237, L. 1969.

93-2601-55. Costs and fees. An initiating court shall not require payment of either a filing fee or other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee but it may direct that all fees and costs requested by the initiating court and incurred in this state when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service, or other service supplied to the obligor, be paid in whole or in part by the obligor or by the state or political subdivision thereof. These costs or fees do not have priority over amounts due to the obligee.

History: En. Sec. 15, Ch. 237, L. 1969.

93-2601-56. Jurisdiction by arrest. If the court of this state believes that the obligor may flee it may

(1) as an initiating court, request in its certificate that the responding court obtain the body of the obligor by appropriate process; or

(2) as a responding court, obtain the body of the obligor by appropriate process. Thereupon it may release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his appearance at the hearing.

History: En. Sec. 16, Ch. 237, L. 1969.

93-2601-57. State information agency. (a) The state department of social and rehabilitation services is designated as the state information agency under this act, [and] it shall

(1) compile a list of the courts and their addresses in this state having jurisdiction under this act and transmit it to the state information agency of every other state which has adopted this or a substantially similar act. Upon the adjournment of each session of the legislature the agency shall distribute copies of any amendments to the act and a statement of their effective date to all other state information agencies;

(2) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this act; and

(3) forward to the court in this state which has jurisdiction over the obligor or his property petitions, certificates and copies of the act it receives from courts or information agencies of other states.

(b) If the state information agency does not know the location of the obligor or his property in the state and no state location service is available it shall use all means at its disposal to obtain this information, including the examination of official records in the state and other sources such as telephone directories, real property records, vital statistics records, police records, requests for the name and address from employers who are able or willing to co-operate, records of motor vehicle license offices, requests made to the tax offices both state and federal where such offices are able to co-operate, and requests made to the social security administration as permitted by the Social Security Act as amended.

(c) After the deposit of three (3) copies of the petition and certificate and one (1) copy of the act of the initiating state with the clerk of the appropriate court, if the state information agency knows or believes that the prosecuting attorney is not prosecuting the case diligently it shall inform the attorney general who may undertake the representation.

History: En. Sec. 17, Ch. 237, L. 1969; amd. Sec. 48, Ch. 121, L. 1974.

tion, is compiled in the United States Code as Tit. 42, sec. 1306.

Compiler's Notes

The compiler inserted the bracketed word "and" in subsection (a).

The Social Security Act, as amended, referred to in subsection (b) of this sec-

Amendments

The 1974 amendment substituted "state department of social and rehabilitation services" for "state department of public welfare."

93-2601-58. Duty of the court and officials of this state as responding state. (a) After the responding court receives copies of the petition, certificate and act from the initiating court the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

(b) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this state to enable the court to obtain jurisdiction over the obligor or his property and shall request the court to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

(c) If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

History: En. Sec. 18, Ch. 237, L. 1969.

93-2601-59. Further duties of court and officials in the responding state. (a) The prosecuting attorney on his own initiative shall use all means at his disposal to locate the obligor or his property, and if because of inaccuracies in the petition or otherwise the court cannot obtain jurisdiction the prosecuting attorney shall inform the court of what he has

done and request the court to continue the case pending receipt of more accurate information or an amended petition from the initiating court.

(b) If the obligor or his property is not found in the county, and the prosecuting attorney discovers that the obligor or his property may be found in another county of this state or in another state he shall so inform the court. Thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a court in the other county or to a court in the other state or to the information agency or other proper official of the other state with a request that the documents be forwarded to the proper court. All powers and duties provided by this act apply to the recipient of the documents so forwarded. If the clerk of a court of this state forwards documents to another court he shall forthwith notify the initiating court.

(c) If the prosecuting attorney has no information as to the location of the obligor or his property he shall so inform the initiating court.

History: En. Sec. 19, Ch. 237, L. 1969.

93-2601-60. Hearing and continuance. If the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the petition or offers evidence constituting a defense the court, upon request of either party, continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court. The court may designate the judge of the initiating court as a person before whom a deposition may be taken.

History: En. Sec. 20, Ch. 237, L. 1969.

93-2601-61. Immunity from criminal prosecution. If at the hearing the obligor is called for examination as an adverse party and he declines to answer upon the ground that his testimony may tend to incriminate him, the court may require him to answer, in which event he is immune from criminal prosecution with respect to matters revealed by his testimony, except for perjury committed in this testimony.

History: En. Sec. 21, Ch. 237, L. 1969.

93-2601-62. Evidence of husband and wife. Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this act. Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage.

History: En. Sec. 22, Ch. 237, L. 1969.

93-2601-63. Rules of evidence. In any hearing for the civil enforcement of this act the court is governed by the rules of evidence applicable in a civil court action in the district court. If the action is based on a support order issued by another court a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity (section 27 [93-2601-67]) or to a defendant in an action or a proceeding to enforce a foreign money judgment. The determination or enforcement of a duty

of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court.

History: En. Sec. 23, Ch. 237, L. 1969.

93-2601-64. Order of support. If the responding court finds a duty of support it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order. Support orders made pursuant to this act shall require that payments be made to the clerk of the court of the responding state. The court and prosecuting attorney of any county in which the obligor is present or has property have the same powers and duties to enforce the order as have those of the county in which it was first issued. If enforcement is impossible or cannot be completed in the county in which the order was issued, the prosecuting attorney shall send a certified copy of the order to the prosecuting attorney of any county in which it appears that proceedings to enforce the order would be effective. The prosecuting attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.

History: En. Sec. 24, Ch. 237, L. 1969.

93-2601-65. Responding court to transmit copies to initiating court. The responding court shall cause a copy of all support orders to be sent to the initiating court.

History: En. Sec. 25, Ch. 237, L. 1969.

93-2601-66. Additional powers of responding court. In addition to the foregoing powers a responding court may subject the obligor to any terms and conditions proper to assure compliance with its orders and in particular to:

- (1) require the obligor to furnish a cash deposit or a bond of a character and amount to assure payment of any amount due;
- (2) require the obligor to report personally and to make payments at specified intervals to the clerk; and
- (3) punish under the power of contempt the obligor who violates any order of the court.

History: En. Sec. 26, Ch. 237, L. 1969.

93-2601-67. Paternity. If the obligor asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both of the parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise the court may adjourn the hearing until the paternity issue has been adjudicated.

History: En. Sec. 27, Ch. 237, L. 1969.

93-2601-68. Additional duties of responding court. A responding court has the following duties which may be carried out through the clerk of the court:

(1) to transmit to the initiating court any payment made by the obligor pursuant to any order of the court or otherwise; and

(2) to furnish to the initiating court upon request a certified statement of all payments made by the obligor.

History: En. Sec. 28, Ch. 237, L. 1969.

93-2601-69. Additional duty of initiating court. An initiating court shall receive and disburse forthwith all payments made by the obligor or sent by the responding court. This duty may be carried out through the clerk of the court.

History: En. Sec. 29, Ch. 237, L. 1969.

93-2601-70. Proceedings not to be stayed. A responding court shall not stay the proceeding or refuse a hearing under this act because of any pending or prior action or proceeding for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody in this or any other state. The court shall hold a hearing and may issue a support order pendente lite. In aid thereof it may require the obligor to give a bond for the prompt prosecution of the pending proceeding. If the other action or proceeding is concluded before the hearing in the instant proceeding and the judgment therein provides for the support demanded in the petition being heard the court must conform its support order to the amount allowed in the other action or proceeding. Thereafter the court shall not stay enforcement of its support order because of the retention of jurisdiction for enforcement purposes by the court in the other action or proceeding.

History: En. Sec. 30, Ch. 237, L. 1969.

93-2601-71. Application of payments. A support order made by a court of this state pursuant to this act does not nullify and is not nullified by a support order made by a court of this state pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.

History: En. Sec. 31, Ch. 237, L. 1969.

93-2601-72. Effect of participation in proceeding. Participation in any proceeding under this act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding.

History: En. Sec. 32, Ch. 237, L. 1969.

93-2601-73. Intrastate application. This act applies if both the obligee and the obligor are in this state but in different counties. If the court of the county in which the petition is filed finds that the petition sets forth facts from which it may be determined that the obligor

owes a duty of support and finds that a court of another county in this state may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the petition and a certification of the findings to the court of the county in which the obligor or his property is found. The clerk of the court of the county receiving these documents shall notify the prosecuting attorney of their receipt. The prosecuting attorney and the court in the county to which the copies are forwarded then shall have duties corresponding to those imposed upon them when acting for this state as a responding state.

History: En. Sec. 33, Ch. 237, L. 1969.

93-2601-74. Appeals. If the attorney general is of the opinion that a support order is erroneous and presents a question of law warranting an appeal in the public interest, he may

(a) perfect an appeal to the proper appellate court if the support order was issued by a court of this state, or

(b) if the support order was issued in another state, cause the appeal to be taken in the other state. In either case expenses of appeal may be paid on his order from funds appropriated for his office.

History: En. Sec. 34, Ch. 237, L. 1969.

93-2601-75. Additional remedies. If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in the following sections.

History: En. Sec. 35, Ch. 237, L. 1969.

Compiler's Notes

Sections 93-2601-75 to 93-2601-82 com-

prise Part IV of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Registration of foreign support orders."

93-2601-76. Registration. The obligee may register the foreign support order in a court of this state in the manner, with the effect, and for the purposes herein provided.

History: En. Sec. 36, Ch. 237, L. 1969.

93-2601-77. Registry of foreign support orders. The clerk of the court shall maintain a registry of foreign support orders in which he shall file foreign support orders.

History: En. Sec. 37, Ch. 237, L. 1969.

93-2601-78. Official to represent obligee. If this state is acting either as a rendering or a registering state the prosecuting attorney upon the request of the court, a state department of social and rehabilitation services, a county commissioner, or other local welfare official shall represent the obligee in proceeding under this part.

If the prosecuting attorney neglects or refuses to represent the obligee, the attorney general may order him to comply with the request of the court or may undertake the representation.

History: En. Sec. 38, Ch. 237, L. 1969; "state department of social and rehabilitation services" for "state department of welfare."

Amendments

The 1974 amendment substituted

93-2601-79. Registration procedure — notice. (a) An obligee seeking to register a foreign support order in a court of this state shall transmit to the clerk of the court (1) three (3) certified copies of the order with all modifications thereof, (2) one (1) copy of the reciprocal enforcement of support act of the state in which the order was made, and (3) a statement verified and signed by the obligee, showing the post-office address of the obligee, the last known place of residence and post-office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the registry of foreign support orders. The filing constitutes registration under this act.

(b) Promptly upon registration the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post-office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall proceed diligently to enforce the order.

History: En. Sec. 39, Ch. 237, L. 1969.

93-2601-80. Effect of registration — enforcement procedure. (a) Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

(b) The obligor has twenty (20) days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition the registered support order is confirmed.

(c) At the hearing to enforce the registered support order the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this state may be stayed the court shall stay enforcement of the order for an appropriate period if

the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

History: En. Sec. 40, Ch. 237, L. 1969.

93-2601-81. Uniformity of interpretation. This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 41, Ch. 237, L. 1969.

93-2601-82. Short title. This act may be cited as the Revised Uniform Reciprocal Enforcement of Support Act (1968).

History: En. Sec. 42, Ch. 237, L. 1969.

Separability Clause

Section 43 of Ch. 237, Laws 1969 read "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect with-

out the invalid provision or application, and to this end the provisions of this act are severable."

Repealing Clause

Section 44 of Ch. 237, Laws 1969 read "Sections 93-2601-1 through 93-2601-40, R. C. M. 1947, are repealed."

CHAPTER 2701

MONTANA RULES OF CIVIL PROCEDURE

II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule

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Spaberg v. Johnson, 143 M 500, 392 P
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II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 4. Persons subject to jurisdiction—Process—**Service.**

5. Service and filing of pleadings and other **papers.**

6. **Time.**

Rule 4. Persons subject to jurisdiction—Process—Service.

A. DEFINITION OF PERSON. As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Amendment

The 1965 amendment restated this rule without change.

B. JURISDICTION OF PERSONS.

(1) **Subject to Jurisdiction.** All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state;

(b) the commission of any act which results in accrual within this state of a tort action;

(c) the ownership, use or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as executor or administrator of any estate within this state.

(2) **Acquisition of Jurisdiction.** Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Amendment

The 1965 amendment restated this rule without apparent change.

Contracts

Although primary negotiations for sale of membership in stock exchange were had in Utah, locus of contract was in Montana and jurisdiction was acquired under this section in view of fact that negotiations continued via telephone and

mail in Montana, that delivery was contemplated and would be made in Montana, and that purchase money mortgage or equivalent lien would follow subject matter of contract to Montana. State ex rel. Goff v. District Court, 157 M 495, 487 P 2d 292.

Nonresident Corporation Jurisdiction

Montana court acquired in personam jurisdiction over nonresident corporation under portions of rule subjecting persons, who transact any business within Montana and persons entering into contracts for services to be rendered in Montana, to jurisdiction of Montana notwithstanding

corporation's contention that most of its Montana business and services it rendered and materials it furnished were within federal enclave known as Malstrom Air Force Base. *Swanson Painting Co. v. Painters Local Union No. 260*, 391 F 2d 523.

In products liability suit instituted by resident, state properly exercised in personam jurisdiction over nonresident manufacturer under long-arm provision relating to commission of act resulting in accrual within state of tort action notwithstanding manufacturer's contention that action offended due process requirements of "fundamental fairness" and "minimum contacts"; action was proper despite facts that defendant maintained no office in state, had no representative resident in or assigned to Montana, received orders from wholesale or retail outlets in Illinois, and had Montana business consisting of less than one-half of one per cent of its total business where foreign corporation deliberately engaged in a policy which was intended to put so much of its product into the state as the market would absorb. *Bullard v. Rhodes Pharmacal Co.*, 263 F Supp 79, distinguished in 341 F Supp 560, 562.

Long-arm jurisdiction obtained over nonresident defendant for commission of act which results in accrual within state of tort action and for entering into contract for services to be rendered or for materials to be furnished in state did not violate due process requirements as embodied in "minimum contacts" test in view of evidence that defendant manufactured products for national and interstate market; that valve was ordered by specifications; that defendant knew at time of shipment that it would be used in Montana; that defendant knew that negligent manufacture might constitute a serious hazard; and that the explosion allegedly resulting from defective valve occurred in Montana. *Continental Oil Co. v. Atwood & Morrill Co.*, 265 F Supp 692, distinguished in *Yules v. General Motors Corp.*, 297 F Supp 674.

Exercise of long-arm jurisdiction over nonresident defendant for commission of act which results in accrual within state of tort action did not violate due process requirements and was within "minimum contacts" rule in view of evidence that nonresident manufacturer knew that cableway it manufactured would be used on construction site in state and that it sent several of its employees to state to inspect cableway. *Hartung v. Washington Iron Works*, 267 F Supp 408.

Montana properly exercised in personam jurisdiction over nonresident assignee of retail installment sales contract in suit for assignee's conversion of truck

by repossessing it under provision relating to commission of any act which results in accrual within state of tort action; action was proper notwithstanding assignee's due process contentions in that his activities in Montana were insufficient in view of evidence that when contract was assigned, the assignee knew vehicle would be used throughout United States; that assignee did not object when truck was moved to Montana and thereafter accepted payments mailed from Montana; that following accident in South Dakota, vehicle was removed to Montana at assignee's request; and that assignee had its agent, a wholly owned subsidiary, repossess truck in Montana and take necessary steps to obtain title to it. *Boyt v. Emmco Ins. Co.*, 271 F Supp 366.

A corporation is not "found within the state of Montana" unless it has agents or officers upon whom process may be served or unless its business has been of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction of the state; such an inference cannot arise by the mere solicitation of business and shipment of product into the state and occasional trips by an officer or agent into the state for solicitation purposes. *McIntosh v. Heil Co.*, 350 F Supp 866.

Retroactive Application

This rule applied to act of alleged malpractice occurring in Montana prior to effective date of this rule (Rule 86(a)) and doctor who had not resided in Montana since effective date of rule could be served properly with process, under Rule 4D(3), in California. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 111.

The giving effect to the service of summons provisions of this rule, when the operative facts of the case to which the rule was applied had taken place prior to the effective date of the Montana Rules of Civil Procedure as set out in Rule 86 (a) was not a prohibited retroactive application of this rule within the meaning of section 12-201. *Weber v. Hydroponics, Inc.*, 226 F Supp 117, 118.

Service of Process Within Exterior Boundaries of Indian Reservation

Service of process on Indian defendant in divorce action was effective where marriage took place off the reservation; service of process on Indian reservation was not violation of Indian tribe's sovereignty under United States law. *Bad Horse v. Bad Horse*, — M —, 517 P 2d 893.

Tort Accruing

Swedish corporation which sold ammunition throughout the United States

through an American distributor subjected itself to Montana jurisdiction when defective ammunition sold in Idaho resulted in injury in Montana. *Scanlan v. Norma Projektil Fabrik*, 345 F Supp 292.

Transacting Business

State had jurisdiction over person of nonresident defendant who placed purchase order directly with a Montana wholesaler once and paid by direct check to the wholesaler on several occasions, even though defendant had never personally met plaintiff nor been in the state. *Prentice Lumber Co. v. Spahn*, 156 M 68, 474 P 2d 141.

Personal services of employee doctor of hospital in Minnesota, rendered to plaintiff in Montana at plaintiff's convenience and incidental to employee's personal journey to Montana, was not sufficient to bring hospital under jurisdiction of Montana for a tort occurring in Minnesota. *Aylstock v. Mayo Foundation*, 341 F Supp 560.

Law Review

Ganz, "Doing Business" in Illinois as a Basis of Jurisdiction Over Nonresidents—Due Process and Contracts," Vol. 1, No. 4 *Illinois Continuing Legal Education* 75 (October 1963).

C. PROCESS.

(1) **Summons—Issuance.** Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) **Summons—Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to land situated in _____ County, Montana, and described as follows: (Here insert descriptions of land.)." For exceptions to this form of summons see 4D(4) "Other Service," set forth hereinafter.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The 1965 amendment made minor changes in the caption to paragraph (2) and in references to R. C. M. 1947.

The amendment of September 29, 1967 substituted the last sentence in subdivision (2) for former sentence requiring compliance with sections 84-4165 and 93-6228 and with provisions of Rule 4D(5) (h); and made minor changes in phraseology.

Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

This amendment, together with the change in 4D(4), is intended to make it clear that there is no conflict between the requirements of the rules with respect to summons for publication and the requirements of section 93-6228, and that section 93-6228 governs actions to establish title to property granted to heirs of deceased entryman but has no application to other actions.

D. SERVICE.

(1) By Whom Served. Service of all process shall be made by a sheriff of the county where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of 21 not a party to the action, except that a subpoena may be served as provided in Rule 45.

(2) Personal Service Within the State. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation, partnership or other unincorporated association, or upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily

at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to the registered agent of said corporation named on the records of the Secretary of State, or to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the corporation, partnership, or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation organized under the laws of any other state or country which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any such person. Upon the filing with the clerk of court in which the claim for relief is pending of an affidavit reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found, and there has also been deposited with the said clerk the sum of \$5.00 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service, then the clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in his absence from his office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the

affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation was originally incorporated, if known; and the secretary of state shall make his return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation regardless of the receipt of any return receipt or advice of refusal of the addressee to receive the process mailed, as is hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as hereinabove provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within sixty days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any

member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.

(3) Personal Service Outside the State. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.

(4) Other Service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h), and with the provisions of sections 40-2819, 40-3405, 40-3406, 40-3423, 40-3424, 93-6228, 93-6229, 93-6230, and 93-6232, R. C. M. 1947, when the action pertains to the provisions of such sections.

(5) Service by Publication — When Permitted — Effect — Manner — Proof.

(a) When Permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

(b) Effect of Service by Publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of Pleading and Affidavit for Service by Publication; and Order for Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in (5)(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry, and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6); and (iii) in the situation defined in (5)(a)(iv) above, there must be first presented to the court proof that a valid attachment or garnishment has been effected. Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of court.

(d) Number of Publications. Service of the summons by publication may be made by publishing the same three times, once each week for three successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) Mailing Summons and Complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first

publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a corporation, and personal service cannot with due diligence be effected within Montana on any of the persons designated in D(2)(e) above, then service may be completed on said corporation by service upon the secretary of state in the manner, and following the procedure outlined in D(2)(f) above.

(f) Time When First Publication or Service Outside State Must Be Made. The first publication of summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any party intended to be served by such publication.

(g) When Service by Publication or Outside State Complete. Service by publication is complete on the date of the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.

(h) Additional Information to Be Published. In addition to the form of summons prescribed above in "C. Process, (2) Summons—Form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

(6) (a) Service on Secretary of State. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of court in which such claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state, and there has also been deposited with the clerk of the court in which such claim for relief is pending the sum of five dollars to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; then the clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons

attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or his deputy to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or his deputy, may cause copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

The secretary of state, or his deputy, shall make an original and two copies of an affidavit reciting: (1) the fact of service upon him by the clerk of court, including the day, and hour of such service; (2) the fact of his mailing a copy of the summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where he is relieved from doing so under the provisions of D(2)(f) in which cases his affidavit shall so recite; and (3) the fact of his receipt of a return from the postal department including the date, and hour thereof, and attaching to his affidavit a copy of such return. The secretary of state, or his deputy, shall then transmit the original summons, and his original affidavit along with copy of his notice to the defendant where such notice was required, to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice was required. The secretary of state shall keep on file in his office a copy of the summons, a copy of the affidavit served on him by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

(b) [Continuance to Allow Defense.] In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(8) Proof of Service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the date and place of service.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

(9) Contents of Affidavit of Service. Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

(10) Procedure Where Only Part of Defendants Are Served. If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1965 amendment rewrote paragraphs (e) and (f) of subdivision (2), for previous text of which see parent volume; substituted "if the defendant is a domestic or foreign corporation, that none

of the persons designated in D(2)(e) above can" for "that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can" in clause (ii) of paragraph (5)(c); inserted "and if desired, it may be combined in one instrument with the affidavit required under 4 D(2)(f), or 4 D(6)" at the end of clause (ii) of paragraph (5)(c); substituted the second sentence of paragraph (5)(e) for two sentences applying only to foreign corporations, for text of which see parent volume; substituted "any party intended to be served by such publication" for

"any person not served within said 60-day period" at the end of paragraph (5)(f); completely rewrote subdivision (6), for previous text of which see parent volume; inserted "by" in clause (8)(b); and made minor style changes in paragraphs (3), (4), and (5)(a)(iv).

The amendment of September 7, 1965, in subdivision (2), deleted "or attorney" in clause (i) of paragraph (e) and, in paragraph (f), substituted "court of this state" for "court in this state" in the first clause of the first sentence, substituted "subject to the jurisdiction * * * Rule 4B above" for "actually doing business within Montana or was actually doing business in Montana at the time the claim for relief arose," in the second clause of the first sentence, and substituted "persons" for "person" in the fourth sentence.

The amendment of November 28, 1966 added paragraph (i) of subdivision (2); in the second sentence of subdivision (3), deleted "of summons" after "Where service," deleted "made after the filing of the required complaint and required affidavit for publication" after "out of the state," inserted the reference to 4(5)(c), and made other changes in phraseology; and, in clause (8)(d), substituted "date" for "time."

The amendment of September 29, 1967, in subdivision (4), inserted "with the provisions hereafter prescribed in D(5)(h), and" and "93-6228."

The 1971 amendment inserted in subdivision (2)(e)(ii) the provision for service on the registered agent named in the records of the secretary of state.

Commission Note to 1965 Amendment

Because of criticism from several members of the Bar, as well as the office of the Secretary of State, changes have been made in the provisions of Rule 4. In addition, some housekeeping changes have also been made.

We have inserted at the points where changes or additions have been made the new language italicized [not italicized herein; see Amendment note above].

Several members of the Bar have called the attention of the Rules Committee to the fact that particularly in quiet title actions, where defunct corporations were involved, and where none of the persons could be found with due diligence upon whom service could be completed that would be binding on the defunct corporation, that effective service could not be obtained by reason of the requirement of a return of a registered receipt showing delivery of the summons and complaint to the defunct corporation. We have now corrected that defect. In doing so, we have also brought within the framework

of Rule 4 the provisions of R. C. M. 1947, Sections 93-3008, 93-3011, and 93-3012, which will be superseded. In addition, as long as we are changing Rule 4, we have now specified and delineated the same persons to be served whether or not the defendants are domestic or foreign corporations, or domestic or foreign partnerships or other unincorporated associations. It will be recalled that when Rule 4 was first promulgated, and in an effort not to bring about any changes in our prior practice, the old, separate, segregated statutes pertaining to domestic and foreign corporations were segregated in Rule 4. There is no reason, however, why the same persons should not be delineated for both domestic and foreign corporations, and we have now done so in this new writing of Rule 4.

In lieu of the requirement of a return receipt signed on behalf of the corporations, which in many instances cannot be accomplished, as pointed out in the criticism from the Bar, we have now added a requirement for publication of summons against such corporation where none of the persons can be found with due diligence upon whom personal service can be completed. (See the new D(2)(f). In so providing, however, we have now spelled out that the same procedure for publications shall be followed for serving corporations personally in in personam actions, as we have provided for serving such corporations by publication in in rem actions (see D(5)(e)).

Accordingly, we have made an effort to combine and streamline service on corporations by designating the same individual persons who can be served, whether the corporations are domestic or foreign, and providing the same procedure of publication where such persons cannot be found with due diligence, whether or not the defendants are domestic and foreign, and we have eliminated the necessity of the return of a signed registry receipt objected to so heavily by the Bar.

A second important change in the rule is specific authorization for an attorney for the plaintiff to incorporate within the framework of one single affidavit all the material necessary for serving defunct corporations personally, for serving by way of publication, and for serving the secretary of state.

Changes have also been made in those portions of the rule providing for service on the secretary of state. We have eliminated the necessity of the intermediate step of having summons and complaint go through the hands of the sheriff in Lewis and Clark County; we have cut down on the papers that must be kept on file by the secretary of state, particularly eliminating the necessity of his keeping a

copy of the complaint; and we have provided a requirement that the secretary of state shall now serve upon the attorney for the plaintiff the factual information showing what was done by the secretary of state in effecting service, and the date when it was accomplished.

There are other minor housekeeping changes in the rule, and wherever there is any change, omission, alteration, or new language, reference to it is contained at the points where such is accomplished.

Commission Note to September 7, 1965 Amendment

The amendments to Rule 4D(2) as to (e) is to remove an "attorney" because of doubt as to who would be such within the meaning of the Rule. As to (f) to avoid possible conflict of the provisions of this subdivision and those of 4B.

The other amendments [Rules 50(b), 52(b), 59(e) and 60(c)] will expedite the hearing and determination of the motions involved, and provide a time after submission within which the motions are deemed denied if the court fails to decide them.

Advisory Committee's Note to November 28, 1966 Amendment

Rule 4D(2)(i): The purpose of the amendment is to remove doubts as to the manner of suing an estate and a trust, resultant from the inclusion of "an estate" and "a trust" in the definition of a person in 4A.

Rule 4D(3): To make it clear that the personal service outside this state dispenses with the necessity for following the procedure for service by publication prescribed by 4D(5). The provision for service of "a summons and complaint" permits personal service of either the original summons or the summons for publication, together with the complaint. As provided in 4D(5)(g), in case of personal service outside of this state service is complete on the date of such service.

Rule 4D(8)(d): To make it clear that it is the date and not the hour of day which should be shown in the admission of service. The time requirement in certificates or affidavits of personal service is considered desirable and no change in the last paragraph of 4D(8) is recommended.

Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

See Committee's Note to 42C(2).

Retroactive Application

Rule 4B(1), applied to act of alleged malpractice occurring in Montana prior to the effective date of this rule (Rule 86(a)) and doctor who had not resided in Montana since effective date of rule could properly be served with process in California under this rule. State ex rel. Johnson v. District Court of Fourth Judicial District, 148 M 22, 417 P 2d 109, 111.

DECISIONS UNDER FORMER LAW

Paragraph (2)

The doctrine of ostensible agency under section 2-205 has no application in determining whether service of process has been legally made on a "managing or general agent" within the meaning of this rule. Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P 2d 151.

Paragraph (5)

Jurisdiction of the court attaches at the time of personal service of the complaint and summons, so that a prematurely en-

tered default judgment is voidable and not void. Sowerwine v. Sowerwine, 145 M 81, 399 P 2d 233.

Paragraph (8)

Appearance and waiver executed by a foreign corporation, not qualified to do business in Montana, acknowledging receipt of amended complaint filed by plaintiff sufficiently complied with former section 93-3018. Greene Plumbing & Heating Co. v. Morris, 144 M 234, 395 P 2d 252, 255.

Rule 5. Service and filing of pleadings and other papers.

(a) **SERVICE—WHEN REQUIRED.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting

new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

History: En. Sec. 5, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 inserted "Except as otherwise provided in these rules" at the beginning of the first sentence; deleted "affected thereby, but" at the end of the first sentence, making the remainder of the original sentence into the second sentence.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 5(a), as amended 1963.

Explanation of change: The words "affected thereby" stricken out by the amendment, introduced a problem of interpretation. The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules.

Rule 6. Time.

(a) COMPUTATION.

Statute of Limitations

Complaint filed three years and one day after act in suit governed by three-year statute of limitations was timely where

last day of three-year period was Sunday. *Grey v. Silver Bow County*, 149 M 213, 425 P 2d 819.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), (e) and (f), and 60(b), except to the extent and under the conditions stated in them.

History: En. Sec. 6, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: Reference to "59(f)" is added to conform with amendments to Rule 59.

Amendments

The amendment of May 21, 1969 inserted the reference to Rule 50(f).

III. PLEADINGS AND MOTIONS

Rule 8. General rules of pleading.

12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.
13. Counterclaim and cross-claim.
15. Amended and supplemental pleadings.

Rule 7. Pleadings allowed—Form of motions.

(a) PLEADINGS.

Reply

A plaintiff is not required to reply to an answer where not specifically ordered to do so by the court, nor is it mandatory to reply to an affirmative defense of a release, since under Rule 8(d), where no responsive pleading is required, the aver-

ment is deemed denied. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

References

Rambur v. Diehl Lumber Co., 143 M 432, 391 P 2d 1.

(c) DEMURRERS, PLEAS, ETC., ABOLISHED.

References

Payne v. Mountain States Telephone and Telegraph Co., 142 M 406, 385 P 2d 100.

Rule 8. General rules of pleading.

(a) CLAIMS FOR RELIEF.

Amended Complaint

"Amended complaint" filed under original cause number, was a valid, initial complaint where it satisfied requirements of notice despite fact that previous complaint had been withdrawn and dismissed without prejudice. Butte Country Club v. Metropolitan San. & S. S. D. No. 1, — M —, 519 P 2d 408.

Failure to Plead Claim

Where plaintiff failed to plead claim for deficiency judgment on balance remaining after sale of repossessed vehicles, no deficiency judgment could be rendered and the pleadings could not be amended to conform even though evidence had been received which might have supported such a judgment. Gallatin Trust & Savings Bank v. Darrah, 152 M 256, 448 P 2d 734.

Separate Claims on Note and Mortgage
Upon default in an action against the

unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note may properly proceed at its option against either security in the same action. Bozeman Deaconess Foundation v. Cowgill, 143 M 98, 387 P 2d 435.

Statute of Limitations

Although the statute of limitations need not be negated in the complaint, the court should consider whether a motion to amend a complaint relates back to the original complaint and so avoids the bar of the statute of limitations. Prentice Lumber Co. v. Hukill, — M —, 504 P 2d 277.

References

Hidden Hollow Ranch v. Collins, 146 M 321, 406 P 2d 365; Williams v. Superior Homes, Inc., 148 M 38, 417 P 2d 92, 93.

(b) DEFENSES—FORM OF DENIALS. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

History: En. Sec. 8, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

Amendment

The 1964 amendment substituted "or" for "of" after "only a part" in the fourth sentence.

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bank-

ruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

History: En. Sec. 8, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

Amendment

The 1964 amendment substituted "affirmatively" for "affirmative" after "shall set forth" in the first sentence.

Insurance Policy Exclusions

Insurer need not affirmatively plead exceptions and exclusions from coverage contained in policy where entire policy and insurer's denial of coverage were incorporated in insured's pleadings. *Home Ins. Co. v. Pinski Bros., Inc.*, 156 M 246, 479 P 2d 274.

Laches

Defendant who failed to plead laches as an affirmative defense in his answer waived such defense and could not raise the issue in a post-trial motion to dismiss. *Hansen v. Kiernan*, 159 M 448, 499 P 2d 787.

Partial Payment

Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. *Baker Nat. Bank v. Lestar*, 153 M 45, 453 P 2d 774.

Pleadings

Defendant was not entitled to raise

statute of limitations by motion to dismiss since statute of limitations defense is to be pleaded affirmatively. *Butte Country Club v. Metropolitan San. & S. S. D. No. 1*, — M —, 519 P 2d 408.

Res Judicata

Where supreme court affirmed dismissal of complaint by trial court on ground that complaint was unverified as required by section 93-3702 and on additional ground that complaint failed to state a claim upon which relief could be granted and a week later plaintiff filed a second verified amended complaint which eliminated confusion, the issue of res judicata was not so clear that the supreme court on the second appeal could say that the trial court could have found the defense of res judicata available without an answer under Rule 8(c) or responsive pleading to present the record of the former judgment plus a statement to show why it should be treated as res judicata. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 748.

Unavoidable Accident

Unavoidable accident is not among defenses that must be pleaded affirmatively and is covered under general denial of negligence. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

References

Interstate Mfg. Co. v. Interstate Products Co., 146 M 449, 408 P 2d 478.

(d) EFFECT OF FAILURE TO DENY.

Answer

No further proof of heirship was required and summary judgment was proper where portion of paragraph in complaint alleging heirship was admitted in answer. *Sikora v. Sikora*, — M —, 499 P 2d 808.

Reply

The stipulation in this rule that averments in answer to which no responsive pleading is required are denied, read in conjunction with Rule 7(a), does not compel the plaintiff to reply to an answer averring the affirmative defense of a release. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

(e) PLEADING TO BE CONCISE AND DIRECT—CONSISTENCY.

Form of Pleading

No particular form of pleading is necessary to seek partition of property in a divorce proceeding, and where plaintiff

prayed that the court settle and adjust the property rights of the parties, including partition or sale of the property if necessary, and both sides briefed and

argued the issue, there was sufficient notice to defendant and partition was prop-

er. *Hodgson v. Hodgson*, 156 M 469, 482 P 2d 140.

Rule 9. Pleading special matters.

(b) FRAUD, MISTAKE, CONDITION OF THE MIND.

References

Brooks v. Brooks Pontiac, Inc., 143 M 256, 389 P 2d 185.

(c) CONDITIONS PRECEDENT.

General Denial

In action by materialman against general contractor for material supplied subcontractor, contractor could not make affirmative defense that statutory notice was not given under materialmen's statute after materialman alleged that he had complied with all conditions precedent to bringing suit and contractor entered general denial; general denial of allegation

that all conditions precedent were performed did not put matter in issue and would be treated as admission that they were performed. *Treasure State Industries, Inc. v. Leigland*, 151 M 288, 443 P 2d 22.

References

Interstate Mfg. Co. v. Interstate Products Co., 146 M 449, 408 P 2d 478.

Rule 11. Signing of pleadings.

Lack of Verification

Where a complaint was prepared to conform to this rule but lacked verification, and defendant waited until after he received an adverse judgment to raise the

issue in a motion to dismiss on appeal, such motion failed as his proper remedy would have been a motion to strike under Rule 12. *Adams v. Davis*, 142 M 587, 386 P 2d 574.

Rule 12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.

(a) WHEN PRESENTED.

Pleading after Denial of Motion

Defendants had twenty days from day on which motion to dismiss complaint

was denied in which to serve and file responsive pleading. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

DECISIONS UNDER FORMER LAW

Default Taken Prematurely

Husband who went to Canada and was personally served there in divorce action had forty days in which to answer under the combined time allotted in former Rules 4(D)(5)(g) and 12(a), M. R. Civ. P., and default taken before that time was voidable. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

Jurisdiction

Jurisdiction of the court attaches at the time of personal service of the complaint and summons, so that a prematurely entered default judgment is voidable and not void. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before

pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(i) The cases in which place of trial may be changed are specified in section 93-2906, R. C. M. 1947.

(ii) If the county designated in the complaint is not the proper county for trial of the action, the defendant must at the time of his first appearance request by motion that the trial be had in the proper county. Every defense in law or fact, to a claim for relief in any pleading which defendant desires to present by way of motion as hereinabove provided must be joined with, or inserted in, the motion requesting a change in the place of trial. If the court in which the action is commenced grants the request for change of venue, that court shall not consider nor pass upon other defenses in law, or fact, presented by the motion, but such shall be considered and decided by the court sitting in the proper county after the transfer has been completed. No request for change of venue is waived by being joined in a motion with other defenses or objections in law or fact.

(iii) Any request for change in place of trial for grounds 2 and 3 of section 93-2906, R. C. M. 1947, must be presented by motion within 20 days after the answer to the complaint, or to the cross-claim where a cross-claim is filed, or the reply to any answer, in those cases in which a reply is authorized, has been filed; except that whenever at some time more than twenty days after the last pleading has been filed an event occurs which thereafter affords good cause to believe that an impartial trial cannot be had under ground 2 of said section 93-2906, and competent proof is submitted to the court that such cause of impartiality did not exist within the twenty-day period after the last pleading was filed, then the court may entertain a motion to change the place of trial under ground 2 of section 93-2906 within twenty days after that later event occurs.

(iv) With respect to ground 4 of section 93-2906, R. C. M. 1947, the party who disqualifies a district judge, and who desires a change of venue, must include such request in a motion filed along with the affidavit of disqualification. If the party who does not disqualify the district judge desires a change of venue, he shall make such request by motion within 5 days after being served with a copy of the affidavit of disqualification. Unless the parties have agreed in writing upon another district judge, or upon a member of the bar as judge pro tempore, the disqualified district judge must either call in another district judge within fifteen days after filing of the affidavit of disqualification, or ten days after filing of the motion for change of venue, or, if no other judge is called in, grant the motion for

change of venue. If any other qualified district judge shall be called in, as herein provided, and shall, within thirty days after the motion for change of venue has been filed, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made. If the other qualified district judge called in, as herein provided, fails to appear and assume jurisdiction within thirty days after the motion for change of venue has been filed, then the disqualified judge must immediately grant the motion and order a change in the place of trial to some other county.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The 1965 amendment renumbered some of the numbered clauses in the first sentence and added subdivisions (i) to (iv). See Commission Note below.

The amendment of September 29, 1967, in the introductory paragraph, substituted "a party under Rule 19" for "an indispensable party" in item (7); and, in the fourth sentence, substituted "the" for "that" before "claim for relief."

Commission Note to 1965 Amendment

The numbering of the defenses which may be made by motion is changed to conform to that of the Federal Rule, which results in there being no "(3)" because "improper venue" as a ground for motion to dismiss was deleted in 1963. Subdivisions (i), (ii), (iii), and (iv) are added to clarify and detail the time and manner for motions for change of place of trial in the cases specified in Section 93-2906, R. C. M. 1947.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(b), as amended 1966.

Explanation of change: The terminology is changed to accord with the amendment of Rule 19. The numbering of listed defenses of the Montana Rule is retained: "(3) improper venue" is omitted; and the provisions of subdivisions (i), (ii), (iii) and (iv), dealing with motions for change of place of trial, remain unchanged.

Failure to State a Claim

Where contract for sale of real property contained statements that time was of the essence and that payments could be made on or before January 15 of each year, action for breach of contract by vendor against vendee for making accelerated payments was improperly dismissed for failure to state a claim, since

the words of the contract were ambiguous and it did not appear as a certainty that plaintiff was entitled to no relief. *Kielmann v. Morgan*, 156 M 230, 478 P 2d 275.

Complaint against county sheriff and four deputies and county attorneys and two deputies for damages arising out of plaintiff's arrest, search of plaintiff's store, and plaintiff's public trial did not state claim upon which relief could be granted since public officers are immune from civil liability for their official acts and complaint did not allege defendants were acting outside their capacity as public officers or in excess of their authority. *Wheeler v. Moe*, — M —, 515 P 2d 679.

Involuntary Dismissal

Rule 41(b), providing for involuntary dismissal which operates as an adjudication upon the merits, has no application to a motion to dismiss for failure to state a claim under this rule. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 750.

Motion to Dismiss

A motion to dismiss under this rule is equivalent to a demurrer under former procedure. *Payne v. Mountain States Telephone and Telegraph Co.*, 142 M 406, 385 P 2d 100; *Holtz v. Babcock*, 143 M 341, 389 P 2d 869, 390 P 2d 801; *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

While a motion to dismiss for failure to state a claim on which relief can be granted is the same as a demurrer under former Montana procedure and therefore admits to all facts well pleaded, it does not admit to controversial conclusions of law or to the accuracy of alleged construction of written instruments set forth in the pleading. *Holtz v. Babcock*, 143 M 341, 389 P 2d 869, 390 P 2d 801.

An order sustaining a motion to dismiss is not appealable. *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

A motion to dismiss was proper under this rule where return was made more than three years after commencement of action in violation of Rule 41(e), and lack

of jurisdiction did not have to be pleaded as an affirmative defense. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

Res Judicata

Where supreme court affirmed lower court judgment dismissing complaint for failure to state a claim upon which relief

could be granted under this rule, the judgment was not *res judicata* as to a second amended complaint under the provisions of Rule 56(c) treating motion as a summary judgment where matters outside the pleadings were presented to and not excluded by the court. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS.

References

Steffes v. Crawford, 143 M 43, 386 P 2d 842.

(d) **PRELIMINARY HEARINGS.** The defenses specifically enumerated (1) [to] (7) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until trial.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

substituted "(7)" for "(6)" and deleted "the" before "trial" at the end of the section.

Compiler's Notes

The compiler inserted the bracketed "to" near the beginning of this subdivision.

Advisory Committee's Note to September 29, 1967 Amendment

Explanation of change: "(7)" has been substituted for "(6)" to correct misnumbering and conform to the defenses enumerated in subdivision (b) [Rule 12(b)].

Amendments

The amendment of September 29, 1967

(g) **CONSOLIDATION OF DEFENSES IN MOTION.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(g) and (h), as amended 1966.

Amendments

The amendment of September 29, 1967, in the first sentence, substituted "any" for "the" before "other motions"; in the second sentence, substituted "but omits therefrom any defense or objection" for "and does not include therein all defenses and objections" and "on the defense or objection" for "on any of the defenses or objections"; inserted "a motion" after "except"; and substituted "subdivision (h)(2) * * * there stated" for "subdivision (h) of this rule."

Explanation of change: Where a dilatory defense is omitted from a preanswer motion, under the language of these subdivisions [Rule 12(g) and 12(h)] the cases are divided on the question of whether the defense can be included in the answer although it is not permitted in another motion. This amendment prevents the inclusion of such omitted defenses in the answer as well as in another preanswer motion. This change follows the provisions of the federal amendment, except that "improper venue" is not included in the enumeration in (h)(1)(A), because the times for making motions for a change

of venue are specified in subdivisions (b) (ii), (iii) and (iv) of the Montana Rule [12(b)].

The substance of subdivision (g) has not been changed.

(h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Explanation of change: See Advisory Committee's Note under Rule 12(g).

Amendments

The amendment of September 29, 1967 rewrote this rule, dividing it into three subdivisions. For text of former rule, see parent volume.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(g) and (h), as amended 1966.

Lack of Jurisdiction

Defendant who did not plead lack of jurisdiction over the person in his initial response to complaint was precluded from making subsequent motion on the omitted defense under subsection (g) and he thereby waived the defense under provisions of this subsection. *Prentice Lumber Co. v. Spahn*, 156 M 68, 474 P 2d 141.

Rule 13. Counterclaim and cross-claim.

(g) CROSS-CLAIM AGAINST COPARTY.

Failure to File

Employer's insurer who paid judgment entered against employer and employee in automobile accident case did not lose its right of indemnity against employee

by employer's failure to file cross-claim in accident action. *St. Paul Fire & Marine Ins. Co. v. Thompson*, 152 M 396, 451 P 2d 98.

DECISIONS UNDER FORMER LAW

Parties to Cross-claim

District court did not have jurisdiction and power to adjudicate mechanics' liens of cross-complainants, materialmen, where

they failed to serve the principal contractor with process. *Greene Plumbing & Heating Co. v. Morris*, 144 M 234, 395 P 2d 252, 256.

(h) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

History: En. Sec. 13, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 13(h), as amended 1966.

Explanation of change: The amendment to Rule 13(h) incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. The amendment also expressly refers to Rule 20 thus correcting an existing inadequacy by calling attention to the fact that a party pleading a counterclaim or a cross-claim may join

additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion.

Rule 14. Third-party practice.**(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.****Insurance Coverage**

Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile casualty insurance policy which had allegedly been canceled prior to the time of the accident involving the automobile of the insured sued for injuries resulting from the accident, since the issues which did not involve federal law, could be solved in the state court wherein third-party complaint under this rule had been filed by the insured against the insurer in which the insured sought to hold the insurer to the terms of the policy, where the state court could dispose of the coverage problems first under M. R. Civ. P., Rule 42(b). *Western Cas-*

ualty & Surety Co. v. Pinson, 255 F Supp 624, 625.

Separate Trial of Third Party Action

Third party claim initiated by hospital, which was being sued by minor patient burned by defective television switch while in hospital, against lessor of television equipment should have been separated from main action between hospital and patient and tried separately. *Crosby v. Billings Deaconess Hospital*, 149 M 314, 426 P 2d 217.

References

Wheat v. Safeway Stores, Inc., 146 M 105, 404 P 2d 317.

Rule 15. Amended and supplemental pleadings.**(a) AMENDMENTS.****Discretionary Power of Court**

Where it was very clear that the supreme court, upon a former appeal of the same case, was unanimous in its decision to affirm the jury verdict and as to the ineffectiveness of additur order, the fact that the supreme court affirmed the jury verdict and thereby finally determined the amount of the award withdrew any discretion that might have been otherwise possessed by the trial judge to allow amendments to the pleadings. State acting by and through State Highway Commission v. Schmidt, 148 M 316, 420 P 2d 153, 155.

Trial court's discretionary power to grant leave to amend pleadings may be limited by a decision of the supreme court upon a former appeal of the same case. State acting by and through State Highway Commission v. Schmidt, 148 M 316, 420 P 2d 153, 155.

A proposed second amended complaint which sought to substitute an indebtedness on account of goods sold and delivered for indebtedness on a default judgment covering substantially the same

account because the judgment had been set aside, and which attempted to hold the directors personally liable for the debts of a corporation by reason of their failure to file an annual statement, was properly refused by the trial court where the evidence indicated bad faith in that the vacated default judgment was taken without the knowledge of the president or directors of the corporation and in that the course of dealings with the president of the corporation was withheld from the directors of the subject corporation. *Prentice Lumber Co. v. Hukill*, — M —, 504 P 2d 277.

Right to Amendment of Course

The motion to dismiss for failure to state a claim is not a responsive pleading within the provisions of this rule that complaint may be amended once as a matter of course before a responsive pleading is served. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 748.

Timeliness

Granting plaintiff's motion to amend complaint to include theory of implied

warranty of fitness for a particular purpose was error where motion was presented shortly before trial and plaintiff had relied upon theory of negligence through the entire course of the pre-trial proceedings; warranty theory was

foreign to the proper pleading of the case and required defendant to be prepared for an entirely different defense theory. *McGuire v. Nelson*, — M —, 508 P 2d 558.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE.

Jury Instructions

Although this rule has been liberally applied in favor of allowing amendment of pleadings to conform to the evidence, where a change in the theory of liability from negligence to breach of contract caused the trial court to submit to the jury instructions based on both theories, which instructions when read as a whole were conflicting, inconsistent and confusing, trial court erred in denying motion for new trial. *Brothers v. Surplus*

Tractor Parts Corp., — M —, 506 P 2d 1362.

Notice of Claim

Where plaintiff failed to plead claim for deficiency judgment on balance remaining after sale of repossessed vehicles, the pleadings could not later be amended to conform to evidence that would have supported a deficiency judgment. *Gallatin Trust & Savings Bank v. Darrah*, 152 M 256, 448 P 2d 734.

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The requirements of clauses (1) and (2) hereof are satisfied with respect to any city, village, town, school district, county, or public agency, board or officer of such public bodies, and with respect to the state or any state board, agency or officer thereof, to be brought into the action as defendant, if process is served as provided by Rule 4D(2)(g) and (h) for service upon such defendant.

History: En. Sec. 15, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 added the last sentence of the first paragraph and added the second paragraph.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 15(c), as amended 1966.

Explanation of change: This amendment is designed to avoid problems which have arisen in instances in which the complaint named the wrong defendant and the statute of limitations expired prior to an amendment correcting the error. Where

the newly named defendant received notice of the action and knew or should have known that he was the intended defendant, it seems unjust to prohibit relation back.

The most serious difficulties under the Federal Rules have been in suits against the United States or an agency or officer thereof. The second paragraph of the federal amendment contains specific provisions for such cases and the second paragraph of this amendment adapts the federal provision to suits where the true defendant is the state or a political subdivision thereof.

The change will also further the objective of the provision of Rule 25(d) for automatic substitution of the successor public officer.

Amendment after Running of Limitations

If original complaint is timely filed, amended complaint dealing with same transaction set out in original complaint will relate back to original complaint, even though amended complaint changes

legal theory of action, adds claim arising out of same transaction or states facts more specifically, and even though amended complaint is filed after running of statute of limitations. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

(d) SUPPLEMENTAL PLEADINGS.**Notice**

Trial court was justified in refusing to grant defendants' motion to amend their answer by adding an affirmative defense of compromise and settlement, even though it was represented that some

sort of compromise settlement had been reached after filing of complaint and answer, since defendants had not given plaintiffs notice of this motion as required by this section. *Montgomery v. Gehring*, 145 M 278, 400 P 2d 403.

Rule 16. Pretrial procedure—Formulating issues.**Discretion of Court**

Pretrial procedure is optional, it being left to trial court's discretion whether to utilize procedure and to what extent. *Lenz v. Mehrens*, 149 M 394, 427 P 2d 297.

Issues on Appeal

Issues of waiver and breach of contract not covered by pretrial order could not be raised on appeal. *Davis v. Davis*, 159 M 355, 497 P 2d 315.

IV. PARTIES**Rule 17. Parties plaintiff and defendant—Capacity.**

18. Joinder of claims and remedies.
19. Joinder of persons needed for just adjudication.
20. Permissive joinder of parties.
23. Class actions.
- 23.1. Derivative actions by shareholders.
- 23.2. Actions relating to unincorporated associations.
24. Intervention.

Rule 17. Parties plaintiff and defendant—Capacity.

(a) **REAL PARTY IN INTEREST.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state of Montana so provides, an action for the use or benefit of another shall be brought in the name of the state of Montana. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

History: En. Sec. 17, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 deleted the conjunction "but" between the present first and second sentences and

made them separate sentences; and added the third sentence.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 17(a), as amended 1966.

A bailee is added to the list of real parties in interest; and a minor change is made in the text to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule, and carry no negative implications.

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, etc., keeps pace with modern decisions which, in the interests of justice, are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is filed.

Assignee for Collection

Assignees of claim paid by their liability insurer were real parties in interest

and entitled to sue their indemnitor and its insurer in their own names because the assignees had legal title to the claim and this was sufficient to constitute the assignees the real parties in interest. *Washington Water Power Co. v. Morgan Electric Co.*, 152 M 126, 448 P 2d 683.

Oral Gift

Son was not real party in interest in action on stated account, based on oral gift to son, where buyer of goods was never aware that son was owner but dealt entirely through father. *Hanlon v. Anderson*, — M —, 502 P 2d 51.

References

State ex rel. Farmers Elevator Co. of Reserve v. District Court, 147 M 72, 410 P 2d 160.

Rule 18. Joinder of claims and remedies.

(a) JOINDER OF CLAIMS. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims either legal or equitable or both as he has against an opposing party or co-party.

History: En. Sec. 18, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 18(a), as amended 1966.

Explanation of change: Under the prior rule some courts have inferred that the standards of Rules 19, 20, and 22 relate to and limit Rule 18(a) in multiple party cases. Thus, Rule 20(a) resulted in a holding that, unless each claim arose from a single transaction or series of transactions and involved a question common to all defendants, there could be no joinder. *Federal Housing Admr. v. Christianson*, 26 F Supp 419 (D. Conn. 1939). This amendment is designed to overcome such decisions and to state clearly that a party asserting a claim (original claim, counterclaim, cross-claim, third party claim) may join as many claims as he has against an opposing party regardless of the fact that there are multiple parties. The joinder is subject to the court's power to direct appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21. Joinder of parties is governed by other rules operating independently.

In addition to the changes in the Federal Rules the words "or co-party" are added to the Montana amendment for consistency with the provisions of this amendment for cross-claims and Rule 13(g).

Divorce Proceedings

Where wife brought suit for divorce and husband filed cross complaint for adjudication of his right to property acquired by their joint effort, the general equity powers of the court were properly invoked by joining in a single action the prayer for divorce and adjudication of the dispute between the parties concerning property rights. *Tolson v. Tolson*, 145 M 87, 399 P 2d 754, explained in 157 M 252, 257, 484 P 2d 748.

In divorce proceedings, jointly held property may be partitioned by the district court, which has the power to settle and to adjust property jointly accumulated, regardless of whether the pleadings contain a specific prayer for partition. *Hodgson v. Hodgson*, 156 M 469, 482 P 2d 140.

In a divorce action a district court may completely divest the wife of her interest in property, no matter how it is held, and provide for the payment of alimony in lieu thereof; no particular pleading is required to raise question of equitable division of property; any pleading is sufficient which gives notice of pleader's intent to raise the issue; specific relief need

not be requested. *Libra v. Libra*, 157 M 252, 484 P 2d 748, overruling *Emery v. Emery*, 122 M 201, 200 P 2d 251 and

affirming rule of *Johnson v. Johnson*, 137 M 11, 139 P 2d 310.

DECISIONS UNDER FORMER LAW

Assignor Bringing Action

Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to

compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. *Lowe & Lynn v. Flank Oil Co.*, 144 M 499, 398 P 2d 608.

Rule 19. Joinder of persons needed for just adjudication.

(a) **PERSONS TO BE JOINED IF FEASIBLE.** A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: This is a substitution for existing Rule 19 in its entirety. The changes are intended to make clear that whenever feasible the persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before

it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

The change straightens out difficulties in the wording of the old rule. The word "indispensable" is used only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors mentioned in subdivision (b), it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it. The factors mentioned in subdivision (b) of the rule are not intended to be exclusive and others may be applicable in particular situations. The court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed.

Injured Party in Dispute between Insurers

Party who brought original action for injuries but who was not party to either of policies of insurance involved and was only indirectly interested in outcome of litigation between two insurance companies was improper party in declaratory action to determine which of two insurance companies was liable. *National Farmers Union Property & Casualty Co.*

v. General Guaranty Ins. Co., 150 M 297, 434 P 2d 708.

Joinder of Party to Prior Action

Stipulation of owner of bulldozer to be bound by prior judgment even though not a party to previous action precluded subsequent complaint for damages to bulldozer, and there was no need to join him as a party to the previous action. *Morris v. McCarthy*, 159 M 236, 497 P 2d 102.

(b) **DETERMINATION BY COURT OF WHENEVER JOINDER NOT FEASIBLE.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

(c) **PLEADING REASONS FOR NONJOINDER.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

(d) **EXCEPTION OF CLASS ACTIONS.** This rule is subject to the provisions of Rule 23.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

Amendments

The amendment of September 29, 1967 rewrote Rule 19 in general and added Rule 19(d) as a separate subdivision of the rule.

Rule 20. Permissive joinder of parties.

(a) **PERMISSIVE JOINER.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

History: En. Sec. 20, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

This amendment fits into the amendment to Rule 18, and clarifies the antecedent of the word "them."

Amendments

The amendment of September 29, 1967 substituted "these persons" for "of them" near the end of the first sentence; and "defendants" for "of them" near the end of the second sentence.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 20(a), as amended 1966.

Scope

The scope of this rule is procedural in nature and removes obstacles to joinder without affecting the substantive rights of the parties, so that in a suit by real estate agents against buyer and seller, judgment for plaintiff would not, in effect, make the buyer a party to a prior contract between the agents and the seller. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

(b) SEPARATE TRIALS.**Disqualification of Judge**

Disqualification of trial judge did not make his previous order denying a severance of action against multiple defendants either res judicata or the law of the case, and successor district judge could order severance on a new motion. *State ex rel.*

Stenberg v. Nelson, 157 M 310, 486 P 2d 870.

References

Wheat v. Safeway Stores, Inc., 146 M 317, 404 P 2d 317.

Rule 21. Misjoinder and nonjoinder of parties.**References**

Wheat v. Safeway Stores, Inc., 146 M 105, 404 P 2d 317.

Rule 23. Class actions.

(a) **PREREQUISITES TO A CLASS ACTION.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Compiler's Notes

The order of September 29, 1967 revised Rule 23 in general and rewrote Rule 23(a) in particular. For text of former Rule 23(a), see parent volume.

Taxpayers

Affected taxpayers had standing under this rule to ask for declaratory judgment against boards of county commissioners which increased appraisals on ground that state board of equalization used wrong rates in assessing timberlands. State ex rel. Conrad v. Managhan, 157 M 335, 485 P 2d 948.

(b) **CLASS ACTIONS MAINTAINABLE.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Compiler's Notes

The order of September 29, 1967 rewrote Rule 23 generally. For text of former Rule 23(b), "Secondary Action By Shareholders," see parent volume, and see Rule 23.1, "Derivative Actions By Shareholders" in this supplement.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: The amended

rule describes in more practical terms than existed under the old rule the occasions for maintaining class actions; provides that all actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions. It is designed to clear up difficulties in drawing distinctions between joint, common, secondary or several rights, and in defining categories in terms of "true," "hybrid," and "spurious," and to give a better guide to the extent and binding effect of judgments.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED—NOTICE—JUDGMENT—ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Compiler's Notes

The order of September 29, 1967 rewrote Rule 23 generally. Former Rule 23(c), "Dismissed On Compromise," was somewhat similar to present Rule 23(e). For text of former rules, see parent volume.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: In order to avoid the necessity for awaiting final judgment before obtaining review by the supreme court of an order under subdivision

(c)(1) refusing to permit a class action to be maintained as such, Rule (1)(b) of the Montana Rules of Appellate Civil Procedure is amended to make such an order appealable. There does not seem to be a corresponding necessity for direct appeal, as distinct from appeal from the final judgment, where the court determines that the action may be maintained as a class action.

Supervisory Writ

Defendants were not entitled to a supervisory writ against trial court's ruling that action could be maintained as a class action; under subdivision (d) trial court could alter or amend its order as the litigation progresses. State ex rel. Anacanda Aluminum Co. v. District Court, 158 M 228, 490 P 2d 351.

(d) ORDER IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to

prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Compiler's Notes

The order of September 29, 1967 rewrote Rule 23 generally. For text of former Rule 23(d), "Orders To Ensure Adequate Representation," see parent volume.

(e) **DISMISSAL OR COMPROMISE.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

wrote Rule 23 generally and added Rules 23(e) and 23(f). For text of former Rule 23(c), "Dismissal or Compromise," see parent volume.

Compiler's Notes

The order of September 29, 1967 re-

(f) **SECURITY FOR COSTS.** Security for costs and charges, which may be awarded against a representative party, may be required by an opposing party. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the representative party by judgment, or in the progress of the action, not exceeding the sum of one thousand dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Explanation of change: In addition to the changes of the Federal Rule [23], subdivision (f) is added to the Montana Rules in order to afford protection against selection of a representative party who may not be responsible for costs and charges.

Compiler's Notes

The order of September 29, 1967 rewrote Rule 23 generally and added Rules 23(e) and 23(f).

Rule 23.1. Derivative actions by shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated associ-

ation, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 23.1, as adopted 1966.

Explanation of change: A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members.

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings

and require that any appropriate notice be given to shareholders or members.

The Montana amendment conforms to the 1966 federal amendment, except that it omits the federal provision that the complaint be verified and allege "(1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have." No reason is apparent for requiring a verified complaint in this type of action and not in others, and the allegations required by the federal amendment and omitted from this proposal appear to be designed to prevent abuse of federal jurisdiction and to be unnecessary in state practice.

Rule 23.2. Actions relating to unincorporated associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note

Source: Fed. R. Civ. P. 23.2, as adopted 1966.

Explanation of change: Although an action by or against representatives of the membership of an unincorporated associ-

ation has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17. Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

Rule 24. Intervention.

(a) **INTERVENTION OF RIGHT.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute

confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

History: En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 rewrote item (2), substituting it for former items (2) and (3), allowing intervention when representation of applicant's interest might be inadequate and he might be bound by judgment and when applicant would be adversely affected by court's disposition of property.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 24(a), as amended 1966.

Explanation of change: Subdivision (2) is changed because a class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not, as was required under the prior rule, be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by

existing parties. The Rule 19(a)(2)(i) criterion imports practical consideration, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed.

Subdivision (3) is deleted for if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of as was required under that subdivision. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.

(c) **PROCEDURE.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.

History: En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967, in the first sentence, substituted "the" for "all" before "parties" and "as provided in

Rule 25(a)

RULES OF CIVIL PROCEDURE

Rule 5" for "affected thereby" after "parties."

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 24(a), as amended 1963.

Rule 25. Substitution of parties.

(a) DEATH.

Waiver of Substitution Requirements

Failure of plaintiff to substitute executrix of doctor's estate for doctor, in tort action initiated against doctor before his death was waived where attorneys for doctor were also attorneys for executrix,

Explanation of change: This amendment conforms to the amendment of Rule 5(a). See note to that amendment.

attorneys and executrix were present at trial of action and attorneys for executrix had filed motion for additional time in which to perfect appeal from judgment against doctor. *Nagaard v. Feda*, 149 M 190, 425 P 2d 79.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Depositions pending action.

28. Persons before whom depositions may be taken.

30. Depositions upon oral examination.

33. Interrogatories to parties.

35. Physical and mental examination of persons.

Rule 26. Depositions pending action.

(b) SCOPE OF EXAMINATION.

Identity of Witnesses

The identity of a traffic engineer who will testify in a collision case involving a question of concurrent negligence is discoverable under this rule. *Smith v. Babcock*, 157 M 81, 482 P 2d 1014.

Interrogatories

Interrogatories by rate protestors to Public Service Commission, seeking information as to amounts, values, costs, and details of parts of property, were unrelated to main inquiry of lawfulness or reasonableness of rates, and such information was thus privileged and not relevant under this rule. *Public Service Comm. of Montana v. District Court*, — M —, 511 P 2d 334.

Unreasonable Requests

In action by insured against insurance company seeking damages for breach of

contract and punitive damages for violations of the insurance code, trial court abused discretion in ordering answer to interrogatory requesting names and addresses of all persons within the state who had made a claim against the insurance company and whose claims the insurance company had either refused to pay or had not paid in full during the last three years; even if relevant and material to issues pleaded, the interrogatory was unreasonable since the value of the information sought did not bear a reasonable relationship to the annoyance and expense involved in answering the interrogatory. *State ex rel. Bankers Life & Casualty Co. v. Miller*, — M —, 502 P 2d 27.

References

State ex rel. State Highway Commission v. District Court, 147 M 348, 412 P 2d 832.

(e) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rules 28(b) and 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

History: En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 inserted reference to Rule 28(b) and "the" after "require the exclusion of."

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 26(e), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 28(b).

Rule 28. Persons before whom depositions may be taken.

(b) **IN FOREIGN COUNTRIES.** In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to letter rogatory. A commission or a letter rogatory shall be issued on application and notice, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these Rules.

History: En. Sec. 28, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 deleted "state or" after "In a foreign"; substituted "may" for "shall" after "depositories"; and rewrote the remainder of the Rule. For text of former Rule, see parent volume.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 28(b), as amended 1963.

Explanation of change: The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice.

It makes clear that the appointment of a person by commission in itself confers

power upon him to administer any necessary oath.

It negates the judicial requirement sometimes stated that letters rogatory will not issue unless the use of a notice or commission is shown to be impossible or impractical. It permits a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case.

(e) **DEPOSITION TO BE TAKEN IN SISTER STATES AND FOREIGN COUNTRIES FOR USE IN THIS STATE.** Whenever the deposition of any person is to be taken in a sister state or a foreign country, or any other jurisdiction, foreign or domestic, for use in this state, pursuant either to notice or stipulation, the Clerk or equivalent officer of any Court having jurisdiction at the place where the witness is

to be served or the deposition taken, upon proof that notice has been duly served for taking of the deposition or that the parties have stipulated to such taking, may issue the necessary subpoenas or equivalent court instruments to require such witness to attend for the taking of the deposition at the time and place in the sister state or foreign country, or any other jurisdiction, foreign or domestic, designated in the notice or stipulation.

History: En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

Advisory Committee's Note

Officials in some sister states have in-

sisted upon some specific authorization for the issuance of subpoenas by them for use in Montana litigation. The amendment provides that authority.

Rule 30. Depositions upon oral examination.

(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS.

Attorney and Client

Protective relief was granted to strike from an amended complaint quotations and purported quotations from legal opinions prepared by defendant's attorneys for defendant and turned over to plaintiff's attorney in accordance with in camera inspection ordered by the district court, which provided that the opinions were to be treated as confidential material and were not to be made a part of the court record or otherwise disclosed to other persons. *State ex rel. Union Oil Co. of California v. District Court*, — M —, 503 P 2d 1008.

Limitation of Examination

In a libel action it was not error for the trial judge to issue a minute entry order refusing to require the defendant to answer questions submitted by the plaintiff as the court has the power to limit the examination and protect him from annoyance, embarrassment or oppression. *Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

References

State ex rel. State Highway Commission v. District Court, 147 M 348, 412 P 2d 832.

(f) CERTIFICATION AND FILING BY OFFICER—COPIES—NOTICE OF FILING. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) and (3). * * * [Same as parent volume.]

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967, in clause (1), inserted "as certified" before "mail to the clerk" in the last sentence.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 30(f), as amended 1963.

This proposal is patterned after the 1963

federal amendment, and conforms to provisions of Rule 4 which permit the use of certified mail as an alternative to the use of registered mail.

Failure to File

Failure of court reporter to file original copies of depositions in accordance with this rule was at most harmless error where there was ample time to discover this fact and no objection was made. *Mustang Beverage Co., Inc. v. Jos. Schlitz Brewing Co.*, — M —, 511 P 2d 1.

Rule 33. Interrogatories to parties.

Any party may serve upon any adverse party, who has been served with process or who has appeared, written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A party serving interrogatories upon an adverse party shall file the same in the court in which the action is pending. The interrogatories shall be answered separately and fully in writing under oath. The party answering the interrogatories shall set forth a verbatim re-copy of each of the interrogatories, followed by the answer thereto, and shall file the answers in the court in which the action is pending. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served for answer shall serve a copy of the answers upon every party who has made written appearance within 20 days after the service of interrogatories upon him, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 20 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967.

Amendments

The amendment of April 1, 1965 added a third paragraph which read: "A party desiring to serve interrogatories upon an adverse party shall file and serve a copy thereof upon every other party. The party answering the interrogatories shall file the answers in the court in which the action is pending and serve a copy thereof upon every other party."

The amendment of November 28, 1966, in the first paragraph, inserted the second and fourth sentences and substituted "for answer shall serve a copy of the answers upon every party who has made a written appearance" for "shall serve a copy of the answers on the party submitting the inter-

rogatories" in the fifth sentence; and deleted the paragraph added in 1965.

Commission Note to 1965 Amendment

This amendment is consistent with Rule 5. The requirement of service of interrogatories and answers upon all other parties to the litigation may save other parties additional time and effort in duplication of interrogatories resultant from lack of knowledge of what other parties have done. The requirement of filing of answers makes them available to judges who may want to see them.

Commission Note to 1966 Amendment

To put the interrogatories and answers into one document for convenience of use, and to remove any obstacle to the service of interrogatories which may result from the requirement of service upon "every other party."

Identity of Witnesses

Failure to identify witnesses in response to specific interrogatories substantially affected rights of party, entitling him to a new trial. *Sanders v. Mount Haggin Livestock Co.*, — M —, 500 P 2d 397.

Public Service Rate Protest

Rate protestors' interrogatories to Public Service Commission seeking amounts, values, costs, and details of parts of property, were irrelevant to main inquiry of "lawfulness" or "reasonableness" of rates. *Public Service Comm. of Montana v. District Court*, — M —, 511 P 2d 334.

Scope

Although this section should be liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage, it cannot become a weapon for punishment or forfeiture, or

an instrument for the avoidance of a trial on the merits. *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

Unreasonable Requests

In action by insured against insurance company seeking damages for breach of contract and punitive damages for alleged violations of the insurance code, trial court abused its discretion by ordering answer to interrogatory requesting names and addresses of all persons within the state of Montana who had made a claim against the insurance company and whose claims the insurance company had either refused to pay or had not paid in full during the last three years; even if relevant material to issues pleaded, the interrogatory was unreasonable since the value of the information sought did not bear a reasonable relationship to the annoyance and expense involved in answering the interrogatory. *State ex rel. Bankers Life & Casualty Co. v. Miller*, — M —, 502 P 2d 27.

Rule 34. Discovery and production of documents and things, etc.**Inspection of Land**

State's motion for inspection to drill wells on condemnee's property should have been allowed. *State ex rel. State Highway Commission v. District Court*, 147 M 348, 412 P 2d 832.

Real Estate Appraisals

In proceeding to condemn strip of land in front of leased building, highway commission could not be compelled by lessee to produce appraisals containing no opinion as to damages to, or value of, leasehold. *State Highway Commission v. District Court*, 149 M 384, 427 P 2d 49.

Rule 35. Physical and mental examination of persons.

(b) REPORT OF FINDINGS. (1). * * * [Same as parent volume.]

(2) Waiver of Privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action or asserting a defense which places in issue the mental or physical condition of a party to the action, the party examined or a party to the action waives any privilege he may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

History: En. Sec. 35, Ch. 13, L. 1961; 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. amd. Sup. Ct. Ord. 10750-6, Sept. 29, 1967; 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The amendment of September 29, 1967 rewrote clause (2). For text of former rule, see parent volume.

The 1971 amendment inserted "or asserting a defense" near the beginning of clause (2) of the first sentence of subdivision (b) (2); and substituted "a party to the action" for "the party bringing the action" in two places in the same clause.

Advisory Committee's Note to September 29, 1967 Amendment

This amendment extends the existing modification by Rule 35 of subparagraph 4 of R. C. M. 1947, sec. 93-701-4. The purpose is to facilitate the obtaining of competent medical testimony and the use

of testimony of the original attending physician, especially in personal injury cases. The proposal coincides with the view recommended in Wigmore on Evidence (McNaughton rev. 1961), Vol. VIII, secs. 2380 and 2380a.

Physician-Patient Privilege

By filing medical malpractice suit and submitting attending physicians for deposition purposes, patient permanently waived any privilege concerning her eye which was subject matter of suit; order that defense counsel be allowed private conference with physicians was proper. Callahan v. Burton, 157 M 513, 487 P 2d 515.

Rule 36. Admission of facts and of genuineness of documents.**(a) REQUEST FOR ADMISSION.****Answers Filed Late**

Trial court did not abuse its discretion in allowing answers to request for admissions to be filed after time limit had expired since filing delay was accidental and no prejudice to requesting party was shown. Heller v. Osburnsen, — M —, 510 P 2d 13.

Central Issues in Controversy

Request for admissions could not be ignored simply because it dealt with central issues which might in good faith be deemed controverted. Morast v. Auble, — M —, 519 P 2d 157.

Construction

The intent of this rule is that the party served shall make a sworn statement of the truth of any relevant matters of fact set forth in the request for admissions. Daniels v. Paddock, 145 M 207, 399 P 2d 740.

Discretion of Trial Court

Where defendant failed to file admissions on plaintiff's request and was not permitted to file them later or to reopen hearing on summary judgment, whether defendant's admissions, which were signed and verified by defendant's counsel as being made from a letter received from

the defendant, met the intent of this rule was a matter within the discretion of the trial court. Daniels v. Paddock, 145 M 207, 399 P 2d 740.

Failure To Answer

In suit by client against his attorney for money which attorney failed to forward to client, request for admissions were deemed admitted where attorney failed to answer. Daniels v. Paddock, 145 M 207, 399 P 2d 740.

Late Filing of Response

Refusal to permit late filing by plaintiffs of responses to request for admissions in wrongful death action was not an abuse of discretion where there was an eight and a half month delay in filing with an intervening admonition to respond made during pretrial conference and where names of an eyewitness and an investigating highway patrolman had been furnished to plaintiffs through answers to their interrogatories. Morast v. Auble, — M —, 519 P 2d 157.

References

Olson v. City Commission of City of Helena, 146 M 386, 407 P 2d 374.

Rule 37. Refusal to make discovery—Consequences.**(a) REFUSAL TO ANSWER.****Appellate Review**

An appellate court will reverse a trial court judge, who has refused to invoke the sanctions of this section, only when his judgment may materially affect the substantial rights of the parties and allow a possible miscarriage of justice. Wolfe

v. Northern Pacific Ry. Co., 147 M 29, 409 P 2d 528.

Judge's Discretion

It was not an abuse of discretion for trial judge to allow witness for oil refinery to testify as to condition of ground

about railroad tracks where plaintiff-switchman crushed his hand beneath wheel of oil tank car when he allegedly slipped in oil or grease on concrete walkway of refinery in trying to mount the train, even though railroad had not included witness' name in its answer to plaintiff's interrogatories, since witness

was the oil refinery's and plaintiff, knowing oil refinery had been joined as a third-party defendant, had failed to seek disclosure from it, or a pretrial conference, and had allowed other witnesses to testify to the same matter at trial. *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

VI. TRIALS

Rule 41. Dismissal of actions.

43. Evidence.

44. Proof of official record.

44.1. Determination of foreign law.

46. Exceptions unnecessary.

47. Jurors.

50. Motion for a directed verdict and for judgment notwithstanding the verdict.

52. Findings by the court.

Rule 38. Jury trial of right.

(a) RIGHT RESERVED.

Declaratory Judgment

A party has a right to a jury trial on demand where the suit is for a declara-

tory judgment and there are triable issues of fact. *Mahan v. Hardland*, 147 M 78, 410 P 2d 156.

Rule 39. Trial by jury or by the court.

(c) ADVISORY JURY AND TRIAL BY CONSENT.

New Trial

In an equity action for specific performance tried before an advisory jury, where the court granted defendant's mo-

tion for a new trial, the court was not required to order that the new trial be by jury as had the original proceedings. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

Rule 41. Dismissal of actions.

(a) VOLUNTARY DISMISSAL—EFFECT THEREOF.

Dismissal As Affecting Counterclaim

Motion to dismiss complaint was properly granted where counterclaiming defendant did not object to dismissal, where trial was in fact had on defendant's counterclaim and where defendant in fact obtained judgment against plaintiff on coun-

terclaim. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

References

Vennes v. Nollmeyer, 144 M 43, 394 P 2d 178.

(b) INVOLUNTARY DISMISSAL—EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies,

a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 inserted "in an action tried by the court without a jury" before "has completed" in the second sentence and deleted the same phrase from the beginning of the third sentence; and, in the last sentence, substituted "failure to join a party under Rule 19" for "for lack of an indispensable party."

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 41(b), as amended 1963 and 1966.

Explanation of change: Under the prior text of the second sentence of this subdivision [Rule 41(b)], the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. This overlap has caused confusion. Accordingly it is amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases would be a motion for a directed verdict. This amendment involves no change of substance.

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

This amendment also changes the last sentence of this subdivision to accord with the amendment to Rule 19.

Failure To Prosecute

Trial court abused discretion in dis-

missing action for failure of plaintiff to prosecute where case was returned by supreme court to lower court for new trial but trial court failed to set it for trial at next jury term as per order of supreme court. *Jangula v. United States Rubber Co.*, 149 M 241, 425 P 2d 319.

Case was properly dismissed for failure of plaintiff to prosecute where nothing was done to bring it to trial for over twelve years despite fact that defendant had shown no injury by delay, that attorneys had agreed to get together and try to work out agreement and that defendant had filed cross-complaint which was defensive in character. *Cremer v. Braaten*, 151 M 18, 438 P 2d 553.

Failure To State a Claim

This rule has no application to a motion to dismiss for failure to state a claim under Rule 12(b). *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 750.

Findings and Conclusions

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with the Rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of Rules. *Mondakota Gas Co. v. Becker*, 151 M 513, 445 P 2d 745.

Insufficiency of Evidence

District court erred in not granting defendant's motions for dismissal and directed verdict where evidence, viewed in light most favorable to plaintiff, did not support verdict for him. *MacDonald v. Protestant Episcopal Church*, 150 M 332, 435 P 2d 369.

Defendant was entitled to have motion for involuntary dismissal granted where plaintiff wholly failed to establish prima facie case of negligence. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

References

Whitcraft v. Semenza, 145 M 97, 399 P 2d 757.

DECISIONS UNDER FORMER LAW

Insufficient Evidence

Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to show the lack of proper care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

No cause should be withdrawn from the jury unless evidence is susceptible of but one construction by reasonable men and that in favor of the defendant, or the evidence is in such condition that if the jury returned a verdict in favor of the plaintiff, it would be the court's duty to set it aside. *Jackson v. William Dingwall Co.*, 145 M 127, 399 P 2d 236.

Trial court properly granted directed verdict for defendant, employer and ranch foreman, where plaintiff, a ranch hand, was injured while riding atop a bobsled loaded with hay, since plaintiff failed to

make out a prima facie case that tipping of bobsled was due to negligence. *Jackson v. William Dingwall Co.*, 145 M 127, 399 P 2d 236.

(e) **FAILURE TO SERVE SUMMONS.** No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years. When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within three years, or upon whom summons which has been issued within one year has been served and return made and filed with the clerk within three years as herein required.

History: En. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Amendment

The 1965 amendment inserted "as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced" in the first part of the first sentence; substituted "unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court" for "summons shall have been served and return made" in the latter part of the first sentence; and added the second sentence.

Commission Note to 1965 Amendment

This clarifies and brings together the laches provisions with respect to issuance and service of summons. At present Rules 4 C(1), 41(e), Section 93-3002, R. C. M. 1947, and Rule 12(b) all need to be referred to. This amendment incorporates the laches provision of Section 93-4705 (7), R. C. M. 1947, which was repealed by Chapter 13 of the 1961 Session Laws.

This amendment renders Section 93-3002, R. C. M. 1947, unnecessary, and that section superseded and added to Tables B and C.

How Raised

Where return was made more than three years after commencement of action, this subsection, since it is not a statute of limitations, could be raised by motion under Rule 12(b), rather than pleaded as an affirmative defense. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

Pending Actions

Even though there was a lapse of a year between repeal of former section 93-4705, R. C. M. 1947, and adoption of this rule, which is identical, application of this rule to a pending action in which return was made more than three years after commencement of the action was proper, since not only was a reasonable time allowed before the effective date of the change, but the information was widely distributed. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

Probate Matters

Rule does not apply to service of summons in suit on rejected claim in probate which is governed exclusively by statute providing for contesting rejected claims in probate. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

Renewal of Claim

A judgment is not *res judicata* unless it is on the merits, so that a dismissal under this rule, since it is not a statute

of limitations, does not constitute a bar to another suit on the same claim. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

Statute of Limitations

Dismissal under this rule for failure to have summons issued within one year after commencement of the action is a

dismissal for neglect to prosecute within the meaning of section 93-2708; that section does not operate to permit the commencement of a new action after expiration of the statute of limitations. *State ex rel. Equity Supply Co. v. District Court*, 159 M 34, 494 P 2d 911.

DECISIONS UNDER FORMER LAW

Quashing Summons

District court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the

three years required by this rule prior to 1965 amendment. *State ex rel. Belwin, Inc. v. Davison*, 148 M 345, 420 P 2d 842, 844.

Rule 42. Consolidation—Separate trials.

(a) CONSOLIDATION.

"Pending Before the Court"

Cases as to which time for appeal had passed were not "pending before the court" so as to make them amenable to consolidation with cases not yet reduced

to judgment even though amount of insolvent warehouseman's bond might not be sufficient to satisfy all claims in full. *Peavey Company v. Agri-Services, Inc.*, — M —, 517 P 2d 718.

(b) SEPARATE TRIALS.

Abuse of Discretion

In wrongful death and survival action trial court abused its discretion by denying motion for separate trial on issue of validity of release where separate trials would result in convenience and economy of time to parties, witnesses and court and since possible finding that release was valid would end matter and trial of complicated issue of wrongful death and survival would be avoided. *State ex rel. Northern Pacific R. Co. v. District Court of Sixteenth Judicial District in and for County of Rosebud*, 155 M 91, 467 P 2d 145.

for injuries resulting from the accident in the state court, since the issues, which did not involve federal law, could be solved in the state court wherein third-party complaint under *M. R. Civ. P.*, Rule 14(a), had been filed by the insured against the insurer in which insured sought to hold the insurer to the terms of the policy, where state court could dispose of the coverage problem first under this rule. *Western Casualty & Surety Co. v. Pinson*, 255 F Supp 624, 625.

Discretion of Court

Grant of separate trial under this section on counterclaims on matters unrelated to plaintiff's complaint was within discretion of district judge and was not disturbed since no clear abuse of discretion was apparent. *State ex rel. Rooks v. District Court*, 153 M 189, 456 P 2d 308.

Permissive Joinder

Since this section allows for separate trials, practically, it seems desirable to give the broadest possible reading to the permissive language of Rule 20. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

Insurance Coverage

Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile insurance policy, which allegedly had been canceled prior to the time of the accident involving the automobile of the insured who was being sued

Successor Judge

Disqualification of district judge did not render *res judicata* or the law of the case his previous ruling denying severance of claims against different defendants; successor judge could reconsider and grant severance. *State ex rel. Stenberg v. Nelson*, 157 M 310, 486 P 2d 870.

References

Bozeman Deaconess Foundation v. Cowgill, 143 M 98, 387 P 2d 435.

Rule 43. Evidence.**(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION.****Agent of Opposing Party**

District court properly permitted plaintiff to examine driver for company under contract with defendant as an adverse witness under this section, for the purpose of establishing the driver's negligence to be imputed to the defendant, because under the applicable Federal Employer's Liability Act the driver was an agent of the defendant. *Salvail v. Great Northern Ry. Co.*, 156 M 12, 473 P 2d 549.

Plaintiff Called as Defense Witness

Where plaintiff appeared as her own only witness and was not cross-examined by the defendant who then called her as a defense witness, the defense was bound

by her testimony even though it came after the plaintiff herself had rested her case. *Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739.

Statutory Proceedings

In statutory action brought to remove administrator for misappropriation of funds of estate, administrator could be examined as adverse witness since Rule 81, excluding statutory proceedings from Rules of Civil Procedure to extent that statutory proceedings are contrary to Rules, does not bar examination of administrator as adverse witness. In *re Estate & Guardianship of Wyman*, 149 M 525, 429 P 2d 629.

(e) EVIDENCE ON MOTIONS.**Summary Judgments**

Oral testimony may be heard on mo-

tions for summary judgment. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

(f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note

Source: Fed. R. Civ. P. 43(f), as amended 1966.

Explanation of change: This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs.

Rule 44. Proof of official record.**(a) AUTHENTICATION.**

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the

attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 rewrote all but the first sentence of this rule and divided it into two clauses; in the first sentence, the amendment inserted "kept within the United States * * * Ryukyu Islands" and substituted "by" for "with" before "a certificate that."

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: The new provisions of subdivision (a)(1) on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered.

Under subdivision (a)(2) foreign official records may be proved as heretofore, by means of official publications thereof.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. It is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keep it in his custody. The amendment specifically permits use of the chain-certificate method of authentication.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. Reasonable effort must be made to satisfy the basic requirements.

(b) **LACK OF RECORD.** A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 44, as amended 1966.

Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

Explanation of change: Subdivision (b) [Rule 44(b)] is accommodated to the changes made in subdivision (a) [Rule 44(a)].

(c) **OTHER PROOF.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 substituted "authorized by law" for "any applicable statute or by the rules of evidence at common law."

Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note

Source: Fed. R. Civ. P. 44.1, as adopted 1966.

Explanation of change: This is new and clears up uncertainty as to whether foreign law must be pleaded. Under this rule the notice need not be given in the pleadings.

The rule affords a procedure for raising and determining an issue of foreign law. It does not require the court to take judicial notice of the foreign law.

The rule appears to be consistent with and complementary to Rule 9(d) and R. C. M. 1947, section 93-501-6.

Power of Court

Under this section, trial court has power to fashion procedures for determination of whether reciprocity of transfer and reciprocity of inheritance exists between citizens of state and citizens of foreign country. In re Estate of Giurgiu, 155 M 18, 466 P 2d 83, appeal dismissed 399 US 901, 26 L Ed 2d 555, 90 S Ct 2195.

Rule 46. Exceptions unnecessary.

Formal exceptions to rulings, orders, or findings of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

History: En. Sec. 46, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1969 amendment inserted "Except as provided in Rule 52, with respect to findings by the court" at the beginning of the section.

The 1971 amendment deleted the language inserted by the 1969 amendment

and inserted "or findings" in the first clause of the rule.

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: The attention of the Committee has been invited to considerable confusion existing under the old wording of this rule, of Rule 52, and of Section 93-5305, R. C. M. 1947, which statute is now being superseded. It is thought by rewriting Rule 46 and Rule 52 the existing confusions can be avoided.

DECISIONS UNDER FORMER LAW

Exceptions to Findings and Conclusions

Effect of rule providing that formal exceptions are unnecessary but requiring

aggrieved party to make objections and grounds therefor known to court, when considered with statute providing that no

judgment will be reversed on appeal for defects in findings unless exceptions are made to findings complained of in lower court, is that counsel must point out exceptions to findings on motions where court is required to make findings of fact and conclusions of law so that trial court

may have opportunity to correct them and upon failure to do so, findings become final and judgment will not be reversed. *Stapp v. Nickels*, 150 M 220, 434 P 2d 141, distinguished in 157 M 295, 299, 485 P 2d 703.

Rule 47. Jurors.

(b) **MANNER OF SELECTION AND ORDER OF EXAMINATION OF JURORS.** From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, and the juror called to replace the juror excused for cause shall take the number of the juror who has been excused, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant then striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which jurors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until a jury of twelve persons and the determined number of alternates shall remain to make up the trial jury.

History: En. Sec. 47, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The amendment of May 21, 1969 inserted "and the juror called * * * who has been excused" in the second sentence.

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: In some judicial districts the practice is that the replacement juror takes a new number at the bottom of the list, in others the replacement takes the same number as the juror excused. This amendment expressly adopts the latter and makes the practice uniform throughout the state.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) **MOTION FOR DIRECTED VERDICT—WHEN MADE, EFFECT.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

History: En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 added the last sentence, giving effect to an order for directed verdict even without the jury's assent.

Advisory Committee's Note to September, 29, 1967 Amendment

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to members of the jury.

Breach of Employment Contract

Statement by office secretary of local union to its executive officer that latter had been removed from office was not the type of information which would lead a prudent person to believe she had been discharged, and local union was entitled to directed verdict in officer's action for breach of employment contract where there was no evidence that officer had in fact been discharged, she was not subject to discharge at will and she had never talked to anyone in authority to confirm her discharge. *Hannifin v. Retail Clerks International Assn.*, — M —, 511 P 2d 982.

Circumstances Under Which Motion Should Be Granted

Denial of motion for directed verdict,

made by lessor of destroyed building in suit by lessee claiming that premises were repairable, was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building involved was destroyed. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

Granting Motion at End of Plaintiff's Case

Court erred in granting plaintiff's motion for directed verdict before defendant had opportunity to present his case, where defendant was precluded from offering evidence to rebut presumption of negligence raised by plaintiff's case in chief based on doctrine of *res ipsa loquitur*, notwithstanding fact that plaintiff had examined all witnesses to accident during his case in chief. *Baker v. Rental Service Co.*, 150 M 166, 432 P 2d 624.

Refusal to Grant Motion

Party who alleges error in refusing his motion under this section had burden of showing that error was in fact committed. *Fuchs v. Huether*, 154 M 11, 459 P 2d 689.

Waiver of Jury Trial

Where both parties in jury trial moved for directed verdict at the close of evidence, trial court improperly granted plaintiff's motion, since there were factual issues for jury to decide and since, under this section, a motion for a directed verdict is not a waiver of trial by jury. *Borgmann v. Diehl*, 155 M 458, 473 P 2d 529.

(b) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after service of notice of entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any

judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Motions provided by this subdivision shall be heard and determined within the times provided by Rule 59 for the hearing and determination of motions for new trial.

History: En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The amendment of September 7, 1965 added the second paragraph.

The amendment of September 29, 1967 substituted the present heading for "Reservation of decision on motion" and, in the second sentence of the first paragraph, substituted "Not later than 10 * * * judgment" for "Within 10 days after the reception of a verdict."

The amendment of May 21, 1969, in the second paragraph, substituted "Rule 59 * * * for new trial" for "Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for new trial."

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: A motion for

judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

This departs from the federal amendment in providing that the time limit for making a motion for judgment n.o.v. is 10 days after service of notice of entry of judgment, rather than 10 days after entry of judgment as provided in the federal amendment. This is consistent with the provisions of Rules 59(b) (time for motion for a new trial) and 52(b) (time for motion to amend findings by the court).

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: A housekeeping change to conform with superseding section 93-5606, R. C. M. 1947, by the amendment of Rule 59.

Refusal to Grant Motion

Party alleging error in refusing his motion under this section had burden of showing that error was in fact committed. *Fuchs v. Huether*, 154 M 11, 459 P 2d 689.

(c) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the supreme court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that

denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the supreme court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after service of notice of entry of the judgment notwithstanding the verdict.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The procedure

where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative has often been misunderstood. This amendment summarizes the practice. It does not alter the effects of a jury verdict or the scope of appellate review.

(d) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—DENIAL OF MOTION.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the supreme court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the supreme court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Advisory Committee's Note

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: This subdivision does not attempt a regulation of all aspects of the procedure where the motion

for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

Rule 51. Instructions to jury—Objection.

Preserving for Review

Appellant who objected to jury instruction but did not specifically object to an interchange of words therein did not preserve review of the interchange. *Cross v. Trethewey*, 155 M 337, 471 P 2d 538.

Objections to jury instructions made at trial on grounds of insufficient evidence to support the instructions but not pointing out how the evidence was insufficient, did not preserve the question for review on appeal. *Salvail v. Great Northern Ry. Co.*, 156 M 12, 473 P 2d 549.

Plaintiff's contention on appeal which is clearly an objection to instruction in trial court will not be considered by supreme court where plaintiff failed to object to instruction in trial court. *Roberts Realty Corp. v. City of Great Falls*, — M —, 500 P 2d 956.

Refusal to Give Instructions

Denial of offered instructions which were adaptable to defendant's theory of the case was prejudicial error where such denial deprived him of a possible defense of assumption of risk. *Wollan v. Lord*, 142 M 498, 385 P 2d 102, distinguished in 145 M 486, 488, 402 P 2d 41.

It is not error for the trial judge to refuse to give specific instruction where the subject in question has been adequately covered by other instructions. *Holland v. Konda*, 142 M 536, 385 P 2d 272, 6 ALR 3d 824.

Contention that trial court erred by not instructing jury on defendant's duties toward trespasser was without merit where such instruction was not offered by plaintiff as required by this section. *Gunderson v. Brewster*, 154 M 405, 466 P 2d 589.

Rule 52. Findings by the court.

(a) **EFFECT.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state

separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

History: En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1969 amendment rewrote the first part of the rule and made it into a separate paragraph requiring that findings be reduced to writing and served on the parties.

The 1971 amendment restored the language as it stood prior to the 1969 amendment, with minor changes; and inserted new provisions as the second, third and fifth sentences.

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: Sections 93-5302, 93-5305, 93-5306, and 93-5307, R. C. M. 1947, are hereby superseded. The purpose of changing Rule 52, along with the change made in Rule 46, is twofold. It should eliminate the confusions that now exist with respect to the lack of necessity of making exceptions to the rulings and orders of the court, as distinct from the requirement that appropriate exceptions be made to findings of the court on trial of fact issues. In addition, it incorporates in this one rule the existing practice and procedure with respect to exceptions to findings of the court, and eliminates the necessity of researching for, and referring

separately to, controlling statutes, case decisions, and rules, and then trying to correlate all three.

Appellate Review of Findings

Findings of fact made by trial court will not be disturbed where they are supported by preponderance of evidence. *Western Foundry, Inc. v. Matelich*, 150 M 228, 433 P 2d 789.

Sufficiency of Findings

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with Rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of Rules. *Mondakota Gas Co. v. Becker*, 151 M 513, 445 P 2d 745.

Summary Judgment

Even though findings are not required in granting summary judgment, if findings are made that form the basis for judgment and if the evidence does not support the findings, the judgment will be reversed. *Upper Missouri G & T Electric Cooperative v. McCone Electric Co-op., Inc.*, 157 M 239, 484 P 2d 741.

References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698; *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

(b) AMENDMENT. Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

History: En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The amendment of August 1, 1965 inserted "service of notice of" before "entry of judgment" in the first sentence.

The amendment of September 7, 1965 added a second paragraph providing that motions to amend should be heard and determined within the time for determining motions for new trial as provided by section 93-5606.

The 1969 amendment rewrote the rule to require that parties file written requests for findings, to remove as ground for appeal the want of findings not requested by the party, and to provide for exceptions to findings and the determination thereof.

The 1971 amendment restored the language as it stood prior to the 1965 amendments; inserted "notice of" before "entry of judgment" in the first sentence; and added new language as the third sentence.

Commission Note to August 1, 1965 Amendment

Under Rule 77(d) the prevailing party

has 10 days after the entry of judgment to give the unsuccessful parties notice of such entry. The change in 52(b) is an adjustment to this provision, and is designed to meet the possibility that the prevailing party is the only party that knows of the entry of the judgment and waits 10 days before giving the unsuccessful party notice of such entry. The provision is similar to that found in Rule 59(b) and (e).

Advisory Committee's Note to May 21, 1969 Amendment

See Advisory Committee's Note under Rule 52(a).

Amendment of Findings and Judgment

A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment combined with a motion for a new trial, filed on September 28, 1965, was a motion contemplated by this rule and Rule 59(e) and was not governed by the time limits of section 93-5606. *State ex rel. Rozan v. District Court of Sixteenth Judicial Dist.*, 147 M 532, 416 P 2d 19, 21.

References

Sztaba v. Great Northern Ry. Co., 147 M 185, 411 P 2d 379.

DECISIONS UNDER FORMER LAW

Exceptions Required for Reversal

Under former statute which was superseded by this Rule, objections to findings of district court could not be raised for the first time upon appeal. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Mandate of former statute (superseded by this Rule) that findings of district court would not be reviewed on appeal unless exceptions were taken was not changed by fact that counsel on appeal was not same counsel who tried case in district court. *Olsen v. United Benefit Life Ins. Co.*, 150 M 147, 432 P 2d 381.

Rule providing that formal exceptions are unnecessary if aggrieved party makes his objections and grounds therefor known to court and former statute (superseded by this Rule) providing that no judgment will be reversed on appeal for defects in findings unless exceptions are made in lower court were required to be read together with result that it was necessary for counsel to point out exceptions to findings so that trial court might have opportunity to correct them and failure to do so meant findings became final and judgment would not be reversed. *Stapp v. Nickels*, 150 M 220, 434 P 2d 141.

Under former statute, failure to except to findings of trial court made them final and judgment would not be reversed. *Keller v. Martin*, 153 M 9, 452 P 2d 422.

Under former statute, exceptions had to be made to trial court's defects in findings to give trial court opportunity to correct them or they would become final and not subject to appeal. In re *Estate of Dolezilek*, 156 M 224, 478 P 2d 278.

Prior to 1971 amendment, no judgment would be reversed on appeal for defects in findings unless exceptions had been made in district court. *State ex rel. Bennett v. Dowdall*, 157 M 11, 482 P 2d 572.

Prior to 1971 amendment, failure to except to findings of district court was fatal to appeal. *Sorenson v. Lynch*, 157 M 116, 483 P 2d 907.

Prior to the 1971 amendment dismissal for failure to except to findings is the unavoidable result only in cases where the findings control, and in those instances they cannot be questioned on appeal; however, where the findings do not control, appellants' failure to file exceptions does not require dismissal. *Kretzschmar v. Bickerstaff*, 158 M 178, 489 P 2d 1285.

Prior to 1971 amendment, failure to file exceptions to court's finding within

the time prescribed by this rule did not preclude appeal where party called attention of the court to the alleged errors in the findings by way of a motion to amend

the judgment, coupled with a motion for new trial, which was timely served and filed. *Cope v. Cope*, 158 M 388, 493 P 2d 336.

(c) Repealed.

Compiler's Notes

Supreme Court Order No. 10750-9, dated May 21, 1969, created a new Rule 52 (c) requiring statement of conclusions

of law and entry of judgment. Supreme Court Order No. 10750-10, dated October 22, 1971, effectively repealed Rule 52 (c) by omitting it from Rule 52 as amended.

Rule 53. Masters.

(e) REPORT.

Hearing on Report

No hearing is necessary when no objections are made to report by parties after being notified by clerk that special

master has filed his report. *State ex rel. Ross v. District Court, Fourth Judicial District*, 150 M 233, 433 P 2d 778.

VII. JUDGMENT

Rule 55. Default.

56. Summary judgment.

59. New trials—Amendment of judgments.

60. Relief from judgment or order.

Rule 54. Judgments—Costs.

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Amendment To Include Codefendant

Case would be remanded to district court for purpose of amending, by incorporating appropriate terms, judgment which omitted to name defaulting codefendant who was jointly and severally liable on obligation. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note could properly proceed at its option against either security in the same action. *Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

Separate Claims on Note and Mortgage
Upon default in an action against the

References

State ex rel. Kober and Kyriss v. District Court, 147 M 116, 410 P 2d 945.

(c) DEMAND FOR JUDGMENT.

Divorce Proceedings

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with M. R. Civ. P., Rule 55(b) and no relief different from that demanded in the complaint was granted in violation of this rule, an appeal on those grounds was dismissed by supreme court upon its own motion where no application to set aside default or judgment was made under Rule

60(b). *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

Where pleadings of both parties in divorce proceedings showed that they expected the court to make orders relative to the property, the court had authority to vest all the property in the husband and order alimony paid where justified by the facts, even though neither party had asked for that specific disposition. *Libra v. Libra*, 157 M 252, 484 P 2d 748.

(d) COSTS.

Costs Not Allowed

Section 93-8618 particularly enumerates allowable costs under this rule;

where cost of taking plaintiff's deposition was made merely for the convenience of defendant's counsel, defendant cannot in-

clude such cost in his bill of costs because deposition was for his benefit; deposition was never filed with the district court and plaintiff's counsel did not have

any practical means of securing a copy. *Johnson v. Furgeson*, 158 M 170, 489 P 2d 1032.

Rule 55. Default.

(a) ENTRY.

Answer Filed after Entry by Clerk

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no

notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

(b) JUDGMENT. Judgment by default may be entered as follows:

(1). * * * [Same as parent volume.]

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian ad litem, who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state of Montana.

History: En. Sec. 55, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

Amendment

The 1964 amendment inserted "an" before "account" in the final sentence of paragraph (2).

Answer Filed after Entry by Clerk

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

Clerk's Error

Entry of default judgment by clerk of

court without requiring affidavit from plaintiff of amount due and owing rendered the judgment voidable but not void. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Motion to set aside default judgment because of plaintiff's failure to file affidavit of amount due and owing when it requested entry of default judgment was properly denied where defendant permitted judgment to be satisfied from her property, and no reason to avoid the voidable judgment had been presented. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Under Rule 61 omission of clerk of court to require affidavit of amount due under this rule before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. *Interstate Counseling Service v. Emeline*, 144

M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Divorce Proceedings

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with this rule and no relief different from that demanded in the complaint was granted in violation of M. R. Civ. P., Rule 54(c), an appeal on those grounds was dismissed by the supreme court on its own motion where no application to set aside the default or judgment was made under Rule 60(b). *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

Ministerial Function

Clerk of court in entering a default judgment is performing a ministerial function and must follow procedures in detail and absolutely. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Nonprejudicial Error

Where record showed that defendant

took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by paragraph (2) of this rule and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under M. R. Civ. P., Rule 55(c). *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

Notice

District court was not deprived of jurisdiction to enter default judgment by plaintiff's failure to give three-day notice required by subdivision (2) of this rule where defendant had taken no action from the time of the entry of the default judgment until his death, a period of approximately thirteen months, the judgment was attacked for the first time by his executrix after approximately one year and seven months had elapsed, and almost four years had passed when the motion to set aside and vacate judgment was filed. *Sikorski & Sons, Inc. v. Sikorski*, — M —, 512 P 2d 1147.

(c) DEFAULT — SETTING ASIDE — EXTENSION OF TIME, ETC.

Answer Filed after Entry by Clerk

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

Discretion of Court

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by M. R. Civ. P., Rule 55(b)(2), and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under this rule. *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

Discretion of Court

Denial of defendant's motion to set aside entry of default judgment and

granting of plaintiff's motion for entry of default judgments were not an abuse of discretion where defendant's claims that he had not been informed of proceedings against him were countered by fact that he had been represented by counsel at material times and that he was aware of necessity of filing answer within thirty days of denial of his motion to dismiss. *Johnson v. Matelich*, — M —, 517 P 2d 731.

Good Cause

Motion to set aside entry of default judgment grounded on failure of clerk to give notice to defendant of entry of default failed to show good cause since no notice of entry of default by the clerk of the district court is required. *Johnson v. Matelich*, — M —, 517 P 2d 731.

Voidable Judgments

A default judgment entered prematurely pursuant to this section could not be set aside under M. R. Civ. P., Rule 60(b)(4), since Rule 60(b)(4) applies to void and not voidable judgments. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

References

Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P 2d 151.

DECISIONS UNDER FORMER LAW

Terms of Opening of Default

Fact that corporate defendant claimed sheriff had never served summons upon the corporation, sheriff did not remember service of the summons, and default was not taken until seven years after the

plaintiff was injured constituted clear, un-equivocal and convincing proof to rebut weight accorded sheriff's return of service of process under section 16-2707 to open default judgment. *Sewell v. Beatrice Foods Co.*, 145 M 337, 400 P 2d 892.

Rule 56. Summary judgment.**(a) FOR CLAIMANT.****Negligence Actions**

Ordinarily, issue of negligence is not susceptible of summary adjudication but should motion for summary judgment be made, burden is on moving party to estab-

lish clearly that there is no factual issue to be determined and opposing party does not have burden of showing prima facie case. *Mally v. Asanovich*, 149 M 99, 423 P 2d 294.

(b) FOR DEFENDING PARTY.**Denial of Motion**

In suit by guardians of patient for personal injuries sustained when patient was being X-rayed, district court erred in granting defendant-hospital's motion for summary judgment where there was an issue of fact as to whether radiologist was an independent contractor rather than an agent of the hospital. *Kober v. Stewart*, 148 M 117, 417 P 2d 476, 479.

Support Proceedings

Defendant was properly granted motion for summary judgment in action to enforce amount agreed upon for support in separation agreement which had been reduced by subsequent court modifications. *Gessell v. Jones*, 149 M 418, 427 P 2d 295.

References

Silloway v. Jorgenson, 146 M 307, 406 P 2d 167.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Affidavits shall not be considered for any purpose on motion for summary judgment. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

History: En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Amendment

The 1965 amendment inserted "answers to interrogatories" in the first sentence.

Commission Note to 1965 Amendment

The amendment expressly includes "answers to interrogatories" among material which may be considered on motion for summary judgment. This conforms to an amendment to the Federal Rule adopted January 21, 1963, the Federal Rule having inadvertently omitted the phrase. The courts have generally reached by interpretation the result required by the amendment.

Affidavits

Affidavit of superintendent of banks will

be struck from record on appeal from a summary judgment because under this rule it could not have been considered by the trial court in ruling on motion for summary judgment. *Miners & Merchants Bank v. Dowdall*, 158 M 142, 489 P 2d 1274.

Appeal

Summary judgment on issue of liability only was "interlocutory in character" and not appealable until damage issue had been resolved; time for taking appeal did not run from entry of summary judgment on liability but would commence upon entry of final order. *Schultz v. Adams*, — M —, 507 P 2d 530.

Burden of Proof

The moving party for a summary judgment has the burden of showing the ab-

sence of any genuine factual issue. *Kober v. Stewart*, 148 M 117, 417 P 2d 476, 478.

Matters Considered

While this rule does not mention oral testimony as material to be used at the summary judgment hearing, Rule 43(e) permits the use of oral testimony upon motions, so that oral testimony may be considered upon a motion for summary judgment. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

In case in which plaintiff's deposition alone was sufficient to permit the trial judge to determine that the case contained no issue of material fact or controversy relating to the testatrix's incompetency, the trial court was correct in granting summary judgment and had no duty to anticipate possible proof that might have been offered under the pleadings. *Silloway v. Jorgenson*, 146 M 307, 406 P 2d 167.

Where trial court was present during taking of depositions, facts heard by court were properly considered on motion for summary judgment pursuant to this section since oral testimony is properly withheld in matters which court may consider under such motion. *Citizens State Bank v. Duus*, 154 M 18, 459 P 2d 696.

Although fact that both parties moved for summary judgment does not establish that all factual questions have been answered, trial court need only consider evidence and issues presented and has no duty to anticipate possible proof that might be offered under the pleadings. *Faith Lutheran Retirement Home v. Veis*, 156 M 38, 473 P 2d 503.

Pleadings Not Controlling

On a motion for summary judgment the formal issues presented by the pleadings are not controlling and the court must consider the depositions, answers to interrogatories, and admissions on file, oral testimony and exhibits presented. *Hager v. Tandy*, 146 M 531, 410 P 2d 447.

Principal and Agent

Purported agent and principal were entitled to summary judgment where plaintiff wholly failed to establish prima facie case of negligence on the part of either even though evidence raised question of fact as to existence of agency since it would be impossible to impute negligence to principal where negligence had not been established against supposed agent. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

Proof of Issue of Fact

Motion for summary judgment was properly granted where it was apparent from record that there was no genuine

issue as to any material fact, notwithstanding aggrieved party's argument on appeal that had he been allowed to go to trial he would have presented proofs establishing genuine issue of fact, since aggrieved party presented no such proofs at hearing on original motion nor at hearing on motion to vacate judgment. *Brown v. Thornton*, 150 M 150, 432 P 2d 386.

Trial court, in action on farm lease, construing lessor's motion for dismissal as motion for summary judgment, improperly granted summary judgment where lessor failed to sustain burden of showing absence of any genuine issue as to material facts; record on appeal was replete with issues of fact determinable by jury. *Byrne v. Plante*, 154 M 6, 459 P 2d 266.

In an action for injuries allegedly caused by negligence of contractor and his agents, trial court properly granted summary judgment pursuant to this section where record revealed total absence of negligence on part of defendant or its employees and record revealed that nothing defendant did or failed to do was proximate cause of plaintiff's injuries. *Flansberg v. Montana Power Co.*, 154 M 53, 460 P 2d 263.

Summary judgment for defendant was proper where contract clearly prohibited competing activities only on specific premises and plaintiff admitted in his answers to interrogatories that the activities he sought to prevent were outside the premises. *Matteucci's Super Save, Drug v. Hustad Corp.*, 158 M 311, 491 P 2d 705.

Purpose

The general purpose of this rule is to dispose promptly of actions in which there is no genuine issue of fact, thereby eliminating unnecessary trial, delay, and expense. *Silloway v. Jorgenson*, 146 M 307, 406 P 2d 167.

Questions of Fact

Allegation by vendees of direct misrepresentation as to acreage they were being sold raised material issue of fact for the jury precluding summary judgment in action to cancel contract for deed and reinvest title in vendors. *Eisemann v. Hagel*, 157 M 295, 485 P 2d 703.

Summary judgment was not proper where pleadings in declaratory judgment action to invalidate municipal vacation of streets left triable issues of fact as to whether plaintiffs' easements would be impaired by vacation. *Kemmer v. City of Bozeman*, 158 M 354, 492 P 2d 211.

Liability cannot be adjudicated upon motion for summary judgment where factual issues concerning negligence and causation are presented. *Duchesneau v. Silver Bow County*, 158 M 369, 492 P 2d 926.

Res Judicata

Where supreme court affirmed lower court judgment dismissing complaint for failure to state a claim upon which relief could be granted under Rule 12(b), the judgment was not res judicata as to a second amended complaint under this section where matters outside the pleadings were presented to and not excluded by court. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749.

Statute of Frauds

Potential buyer was properly granted summary judgment for return of earnest money when defendant realtor could produce no written documents to support his claims relative to listing property for sale and acting as real estate agent for property owners. *Pack River Co. v. Young*, — M —, 511 P 2d 12.

Third Party Complaint

Summary judgment should not have been granted in favor of third party defendant on third party complaint initiated by hospital sued for negligence by minor patient burned by defective television switch while in hospital where third party complaint raised genuine issue of material fact as to whether minor patient was injured solely through negligence of third party defendant who had leased television equipment to hospital. *Crosby v. Billings Deaconess Hospital*, 149 M 314, 426 P 2d 217.

References

Brannon v. Lewis and Clark County, 143 M 200, 387 P 2d 706.

(d) PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS.**Declaratory Judgment**

In declaratory judgment action in which notice of reclassification was found not to comply with statutory requirements, district court did not abuse its discretion in granting plaintiff-landowners'

motion for summary judgment without considering further issues on the power to reclassify since plaintiffs lacked standing as to those issues. *Mittelstadt v. Buckingham*, 156 M 407, 480 P 2d 831.

Rule 57. Declaratory judgments.**References**

Harrer v. Northern Pacific Ry. Co., 147 M 130, 410 P 2d 713; *Empire Fire &*

Marine Ins. Co. v. Goodman, 147 M 396, 412 P 2d 569.

Rule 59. New trials—Amendment of judgments.

(a) **GROUND.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana. On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The amendment of May 21, 1969 made no change in this rule.

Appellate Review

In condemnation proceeding, where state appraised land at \$18,000, condemnee appraised it at \$95,000 and jury awarded condemnee \$21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite

of the fact there was no rebuttal of state's only expert witness. *State Highway Commission v. Greenfield*, 145 M 164, 399 P 2d 989.

Inadequacy of Award

Court abused discretion in granting new trial "upon the grounds of insufficiency of the evidence to justify the verdict in that the verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car

driven by man who had several drinks. *Heen v. Tiddy*, 151 M 265, 442 P 2d 434.

Jury Misconduct

New trial was properly granted where foreman of jury made his own investigation at the scene of the accident after hearing testimony and informed the other members of jury, during their deliberation, of the results of his investigation. The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. *Goff v. Kinzle*, 148 M 61, 417 P 2d 105, 107, distinguished in 456 P 2d 835, 496 P 2d 1136, 1140.

Mistake or Inadvertence

Grant of new trial to permit plaintiff to

give additional testimony on issue of damages only was not improper, notwithstanding that ground for relief was mistake or inadvertence and should have been given pursuant to Rule 60(b), where no intervening rights had attached in reliance upon judgment and no actual injustice would ensue. *John J. Ming, Inc. v. District Court*, 155 M 84, 466 P 2d 907.

New Evidence

Ex parte affidavit which alleged newly discovered evidence but was only cumulative in nature was insufficient in light of the record to authorize a new trial. *Fisher v. Mitzel*, 158 M 265, 491 P 2d 186.

DECISIONS UNDER FORMER LAW

Right To Appeal

Defendant was entitled to appeal, in spite of time limitation of section 93-5606 for filing bill of exceptions where motion for new trial was combined with motion to amend findings and request for

review of facts, conclusions of law and judgment, since limitation under section 93-5606 did not apply prior to enactment of new rules of civil procedure. *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

(b) **TIME FOR MOTION.** A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The amendment of May 21, 1969 made no change in this rule.

References

Clark v. Worrall, 146 M 374, 406 P 2d 822.

(c) **TIME FOR SERVING AFFIDAVITS.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which periods may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The amendment of May 21, 1969 made no change in this rule.

(d) **TIME FOR HEARING ON MOTION.** Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinabove except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall rule upon and decide the motion within 15 days after the same is submitted.

If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied.

The decision on the motion may be entered in the minutes of the court, or may be made in writing in chambers or in any county in the state where the judge may be, and be filed with the clerk of court in the county where the action is pending. Upon the hearing, reference may be had in all cases to the pleadings and the orders of the court on file, and reference may also be had to any depositions and documentary evidence offered on the trial, and to the proceedings on the trial and, when necessary, reference may be had to the notes of the court reporter.

If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59.

History: En. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Compiler's Notes

The amendment of Rule 59 by Supreme Court Order No. 10750-9 enacted this subparagraph as Rule 59(d) and designated former Rules 59(d) and 59(e) as 59(e) and 59(f), respectively.

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: Section 93-5606, R. C. M. 1947, is hereby superseded. There has been some confusion by reason of ambiguous language in section 93-5606, R. C. M. 1947, a hold-over statute from the practice which existed before the rules were adopted, and because of the necessity of researching for, and referring to, the case decisions under the statute spelling out the jurisdictional time limits and

the effect thereof. It is felt that by incorporating our practice into this one rule, and eliminating the necessity of referring to statutes and case decisions, that it will be easier for the practitioner to comply.

Expiration of Time

Motion for new trial was automatically denied ten days after service where motion did not contain a notice of hearing and no hearing was held, despite district court clerk's letter dated twenty-two days after filing of motion, informing movant that motion for new trial had been denied. *Leitheiser v. Montana State Prison*, — M —, 505 P 2d 1203.

Failure to Comply

Granting of new trial was reversible error where time limits set forth in this rule were disregarded. *Cain v. Harrington*, — M —, 506 P 2d 1375.

DECISIONS UNDER FORMER LAW

Appellate Review

The appellate court may not disturb the findings of the trial court in ordering a new trial without a showing of abuse of discretion. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

Disqualification of Judge

Section 93-901 does not permit disqualification of a judge pending motion for a new trial under this rule. *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

Judge's Discretion

The jury is delegated the task of finding the facts, but the trial judge has the discretion to prevent a miscarriage of justice by granting a new trial if there is an insufficiency of evidence to support the verdict. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960, explained in *Morris v. Corcoran Pulpwood Co.*, 154 M 468, 465 P 827.

Purpose of Rule

The purpose of this rule is to give a trial judge power to prevent what he considers a miscarriage of justice. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

Scope

This rule permits the trial judge to order a new trial on his own initiative for the same reasons one could be ordered pursuant to section 93-5603 and is subject to the same interpretations as expressed in previous opinions on motions for new trials before adoption of the rule. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

Time Limits

Combined motion for new trial and to alter, amend and supplement findings of fact, conclusions of law and judgment was not subject to time limits of former section 93-5606 requiring prompt hearing on new trial motion and superseded by this rule. *State ex rel. Rozan v. District*

Court, Sixteenth Judicial District, 147 M 532, 416 P 2d 19, 21. See also *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

References

Waite v. Waite, 143 M 248, 389 P 2d 181; *State ex rel. Wilson v. District Court*, 143 M 543, 393 P 2d 39.

(e) **ON INITIATIVE OF COURT.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

The amendment of May 21, 1969 made no change in the wording of this rule.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 59(d), as amended 1966.

Explanation of change: The purpose of this amendment is to make it clear that a court, after notice and opportunity to be heard, may grant a new trial even though a motion for new trial has been made, for a ground not stated in the motion. Some cases have held otherwise.

Compiler's Notes

The amendments of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(d) as Rule 59(e).

Amendments

The amendment of September 29, 1967 added the second sentence and made changes in phraseology.

(f) **MOTION TO ALTER OR AMEND A JUDGMENT.** A motion to alter or amend the judgment shall be served not later than 10 days after the service of the notice of the entry of the judgment, and may be combined with the motion for a new trial herein provided for. This motion shall be heard and determined within the time provided hereinabove with respect to a motion for a new trial.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

tence for the former second paragraph added in 1965; and made changes in phraseology.

Compiler's Notes

The amendment of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(e) as Rule 59(f).

Amendments

The amendment of September 7, 1965 added a second paragraph which read: "Motions provided by this subdivision shall be heard and determined within the time provided by Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for a new trial."

The amendment of May 21, 1969 added "and may be combined with the motion for a new trial herein provided for" to the first sentence; substituted the second sen-

Additur

This rule did not give the district court power to order an additur to a condemnation award as a condition of denying motion for new trial. *State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692.

Time Limit

A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment, combined with a motion for a new trial filed on September 28, 1965 was a motion contemplated by this rule and Rule 52(b) and was not governed by the time limits of section 93-5606. *State ex rel. Rozan v. District Court of Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21.

Rule 60. Relief from judgment or order.

(b) **MISTAKES—INADVERTENCE—EXCUSABLE NEGLIGENCE—NEWLY DISCOVERED EVIDENCE—FRAUD, ETC.** On motion

and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) when a defendant has been personally served, whether in lieu of publication or not, not more than 60 days after the judgment, order or proceeding was entered or taken, or, in a case where notice of entry of judgment is required by Rule 77(d), not more than 60 days after service of notice of entry of judgment. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within 180 days after the rendition of any judgment in such action, to answer to the merits of the original action. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be required by law, or to set aside a judgment for fraud upon the court.

History: En. Sec. 60, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of August 1, 1965 substituted "within 60 days when a defendant has been personally served, whether in lieu of publication or not, calculated from the date of service of notice of entry of the judgment or order or action taken in the proceeding" for "not more than one year after the judgment, order or proceeding was entered or taken" after "for reasons (1), (2), and (3)" in the second sentence; and inserted the third sentence.

The amendment of September 29, 1967 rewrote the second sentence; and substituted "required" for "provided" in the last sentence.

Commission Note to August 1, 1965 Amendment

The purpose of this amendment is to make the Montana practice correspond to practice under the last sentence of R. C. M. 1947, § 93-3905 (which was repealed with the adoption of the Rules of Civil Procedure), as construed in *Smith v. Col-*

lis, 42 Mont. 350, 365-370 (1910). The time within which the motion may be made is shortened, but considered adequate.

Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

The federal rule measures the time for the motion for reasons (1), (2), and (3) from time the "judgment, order, or proceeding was entered or taken." The Montana rule measures the time from the "date of service of entry of the judgment or order or action taken"; but Rule 77(d), requiring notice of entry, is confined to judgments in actions in which an appearance has been made. This amendment, using the federal rule language adjusted to the requirements of Montana Rule 77(d), is for the purpose of avoiding ambiguity and litigation as to what, if any, time limit is imposed in cases of orders, and proceedings, and judgments where no appearance has been made.

Change of Counsel

Motion to have judgment vacated as to date and redated so as to permit moving party to file exceptions to findings or take

other steps counsel deemed necessary for protection of client was improperly denied, and was abuse of discretion where moving party had inadequate time in which to obtain present counsel when conflict of interest arose with prior counsel. *Schmidt v. Lloyd*, 152 M 158, 447 P 2d 485.

Discretion of Court

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by M. R. Civ. P., Rule 55(b)(2), and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment under M. R. Civ. P., Rule 55(c). *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

Slight abuse of discretion in refusing to set aside default judgment for "mistake, inadvertence, surprise, or excusable neglect" is sufficient to justify reversal, and when motion to vacate default judgment is supported by showing which leaves court in doubt or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion. *Uffleman v. Labbit*, 152 M 238, 448 P 2d 690.

Excusable Neglect

Defendant's contention that "personal problems drove all thought of lesser problems from his mind" was not sufficient to set aside a default judgment under subsection 1 of this section. *Dudley v. Stiles*, 142 M 566, 386 P 2d 342.

Grant of new trial pursuant to Rule 59(a) to permit plaintiff to give additional testimony on damages that had been omitted by excusable neglect was not improper, notwithstanding that such relief should have been given under this section, where no intervening rights had attached in reliance upon judgment and no actual injustice would ensue. *John J. Ming, Inc. v. District Court*, 155 M 84, 466 P 2d 907.

Where attorney for defendant had three other active files under same defendant's name and inadvertently filed complaint in one of the other files, with result that answer was not filed in time and plaintiff took judgment by default, a motion pursuant to clause (1) stating the facts and that there was a meritorious defense was adequate to set aside default judgment without verification and without affidavit of merit. *Keller v. Hanson*, 157 M 307, 485 P 2d 705.

Failure to File in Time

Defendant's motion to vacate default judgment was properly denied under this rule where the motion was not filed until more than 480 days after the entry

of judgment despite fact that defendant was served with neither summons nor complaint; filing of motion to vacate default judgment under this rule did not constitute a selection of remedies and movant, after denial of motion, was still free to bring an independent action to vacate the judgment for failure to receive service which action would not be subject to the 180 day limitation contained in this rule. *Thomas v. Savage*, — M —, 505 P 2d 118.

Fraudulently Obtained Judgments

Time within which trial court could set aside judgment on basis of fraud upon the court depended upon equity and discretion, not time limitation of this rule. In re *Bad Yellow Hair*, — M —, 509 P 2d 9.

Judgment Obtained by Fraud

Court of equity has inherent power, independent of statute, to vacate judgment obtained by fraud in violation of last sentence of Rule 60(b) even though party seeking relief was not necessary party in original action and motion to vacate was not made within liberal time limits prescribed by rule but was nevertheless timely considering that aggrieved party engaged attorney to file motion to vacate within thirty days after discovery of existence of judgment. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

In quiet title action, district court properly denied motion to set aside default decree where moving party had no color of title; under this section default judgment will be set aside for excusable neglect only if movant is able to show good defense on merits. *Diamond Investment Co. v. Geagan*, 154 M 122, 460 P 2d 760.

Meritorious Defense

Answer and counterclaim need not be verified when submitted with motion under this rule which stated generally that there was a meritorious defense, and there is no longer a requirement for an affidavit of merit. *Keller v. Hanson*, 157 M 307, 485 P 2d 705.

Mistake of Law

Mistaken belief of party, against whom default judgment was taken, as to legal effect of contract with adverse party was mistake of law, rather than mistake of fact, and was not such a "mistake" as would support vacating the default. *Uffleman v. Labbit*, 152 M 238, 448 P 2d 690.

Probate Matters

Final decree of distribution and discharge in probate will not be set aside on ground of inadvertence or fraud either under statute or Rule 60(b) in absence of manifest abuse of court's discretion in

case where moving party had every opportunity to protect his claim in probate and failed to do so. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

Scope of Rule

Contention that default judgment was erroneous on its face and should be set aside because the judgment and an exhibit attached to the complaint contained inaccurate and erroneous language was outside scope of rule and could not be raised thereunder. *Uffelman v. Labbit*, 152 M 238, 448 P 2d 690.

Voidable Judgment

This rule does not apply to voidable judgments. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

This rule has no application to prematurely entered default judgments since it

applies to void and not voidable judgments. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

Waiver of Right to Relief

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with M. R. Civ. P., Rule 55(b) and no relief different from that demanded in the complaint was granted in violation of Rule 54(c), an appeal on those grounds was dismissed by the supreme court on its own motion where no application to set aside the default or judgment was made under this rule. *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

References

Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P 2d 151; *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

(c) TIME FOR HEARING AND DETERMINING MOTIONS.

Motions provided by subdivisions (a) and (b) of this rule shall be heard and determined within the times provided by Rule 59 in the case of motions for new trials and amendment of judgment.

History: En. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The amendment of May 21, 1969 substituted "Rule 59" for "section 93-5606 of the 1947 Revised Codes of Montana" and "trials" for "trial"; and added "and amendment of judgment."

Rule 61. Harmless error.

Clerk's Error

Omission of clerk of court to require affidavit of amount due under Rule 55(b) (1) before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Contributory Negligence

Submitting issue of contributory negligence to jury was harmless error in light of substantial evidence showing that defendant was not negligent and substantial evidence that even if defendant was negligent plaintiff was not injured in accident or injury was not result of defendant's negligence. *Brown v. Reel*, 148 M 381, 421 P 2d 454.

In a wrongful death action by father of

Advisory Committee's Note to May 21, 1969 Amendment

Explanation of change: Since section 93-5606, R. C. M. 1947, is being superseded because of changes in Rules 46, 52 and 59, the change in Rule 60(c) is likewise required.

eight and one-half year old boy, who, while riding a bicycle, was struck and killed by automobile, court's instruction that deceased boy was incapable of contributory negligence and court's refusal of defendant's offered instruction on contributory negligence was not reversible error, irrespective of question of boy's capacity, since there was no substantial credible evidence of contributory negligence in fact on part of deceased boy. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

Joint Enterprise

Court's rulings with respect to issue of joint enterprise, if error, was harmless error, since driver was sole proximate cause of accident in which passenger suing owner of cattle was injured when car struck cattle on highway. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

Poll of Jury

Lower court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury since error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict,

and that following reading of verdict signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

References

Steffes v. Crawford, 143 M 43, 386 P 2d 842.

Rule 62. Stay of proceedings to enforce a judgment.

(a) Superseded—M. R. App. Civ. P., Rule 7.

Supersession

This section (Sec. 62, Ch. 13, L. 1961), relating to stay of proceedings upon entry

of judgment, is superseded by M. R. App. Civ. P., Rule 7.

(d) Superseded—M. R. App. Civ. P., Rule 7.

Supersession

This section (Sec. 62, Ch. 13, L. 1961), relating to stay of proceedings upon ap-

peal, is superseded by M. R. App. Civ. P., Rule 7.

(e) STAY IN FAVOR OF THE STATE OF MONTANA OR AGENCY THEREOF.**Eminent Domain Proceeding**

Where state highway commission filed notice of appeal and perfected their appeal after writ of execution under section 93-9918 had issued, the appeal stayed the

judgment although no bond was filed as required by section 93-8011, since under this rule no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS**Rule 68. Offer of judgment.****Rule 65. Injunctions.****References**

Holtz v. Babcock, 143 M 341, 389 P 2d 869.

Rule 68. Offer of judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the

amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

History: En. Sec. 67, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

common admiralty practice of determining liability before the amount of liability is determined.

Amendments

The amendment of September 29, 1967 added the last sentence.

Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 68, as amended 1966.

This logical extension of the concept of offer of judgment is suggested by the

Fraud on Court

Although proper procedure was followed under rule providing for offer of judgment, conduct of parties in perpetrating fraud on court required that judgment be vacated on motion of aggrieved beneficiary who was not party to suit against estate. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

IX. APPEALS

Rule 72. Appeal from a district court to the supreme court.

Rule 72. Appeal from a district court to the supreme court.

When an appeal is permitted by law from a district court to the supreme court of Montana, or in any case where original proceedings are commenced in the supreme court, such appeal or original proceeding shall be taken, perfected, and prosecuted pursuant to the provisions of the Montana Rules of Appellate Civil Procedure and controlling statutes to the extent that they are not superseded by the Montana Rules of Appellate Civil Procedure.

History: En. Sec. 71, Ch. 13, L. 1961, amd. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

Subdivision (a) of Rule 41, M. R. App. Civ. P. merely adapts the Montana Rules of Civil Procedure to these Appellate Rules.

Amendments

The 1965 amendment rewrote this section: For previous text, see parent volume.

X. DISTRICT COURTS AND CLERKS

Rule 77. District courts and clerks.

Rule 77. District courts and clerks.

(b) TRIALS AND HEARINGS—ORDERS IN CHAMBERS.

Time for Hearing

Notwithstanding that hearing on defendant's motion for summary judgment was held one day prior to scheduled date, such procedure was permissible under this

section since hearing was held with consent of both court and counsel. *Israelson v. Mountain Tractor Co.*, 155 M 69, 467 P 2d 149.

(d) NOTICE OF ENTRY OF JUDGMENT SERVED.

Sufficiency of Notice

Notice sent to plaintiff's attorney that judgment had been entered in favor of defendant and stating that a copy of the

order adjudging a dismissal with prejudice was attached, was sufficient for compliance with this rule even though a copy of the order was not actually attached. *Jackson v. Tinker*, — M —, 504 P 2d 692.

(e) **TRANSMITTAL OF FILE ON REMOVAL.** Upon the filing of a copy of the petition for removal of any state district court action to the district court of the United States, district of Montana, and a request in writing therefor, the clerk of such state district court shall promptly deliver to the clerk of court of the district court of the United States, district of Montana, all papers then in the original state court file, or theretofore issued and subsequently filed and shall keep in the state court file only the copy of the petition for removal and such papers as were filed with the request for removal.

History: En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1971 amendment substituted "the filing of a copy of the petition for removal" for "being served with a notice of the removal" at the beginning of the rule; inserted "and a request in writing therefor"; inserted "and subsequently filed" after "theretofore issued"; substituted "shall keep in the state court file"

for "subsequently file"; and substituted "copy of the petition for removal" and "request for removal" near the end of the rule for "notice of removal."

Advisory Committee's Note

To define procedure and avoid unnecessary duplication of papers in state and federal court files. The proposed amendment correlates with Rule 10, Revised Rules of Procedure of the United States District Court for the District of Montana effective January 1, 1968.

XI. GENERAL PROVISIONS

Rule 86. Effective date—Statutes superseded.

Rule 81. Applicability in general.

(a) SPECIAL STATUTORY PROCEEDINGS.

Action To Remove Administrator

In statutory action for removal of administrator for misappropriation of funds of estate, administrator could be examined as adverse witness under Rule 43 notwithstanding provisions of Rule 81. In re Estate & Guardianship of Wyman, 149 M 525, 429 P 2d 629.

Review of Public Service Commission Rates

Under this rule, Montana Rules of

Civil Procedure were not applicable to proceeding to review actions and rates of Public Service Commission under section 70-128. Public Service Comm. of Montana v. District Court, — M —, 511 P 2d 334.

References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

(b) APPEALS TO DISTRICT COURTS.

References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

(c) RULES INCORPORATED INTO STATUTES.

References

Steffes v. Crawford, 143 M 43, 386 P 2d 842.

Rule 83. Rules by district courts.

Briefs Required on Preliminary Motion

Trial court rule requiring filing of briefs in support of preliminary motion is proper exercise of authority under this

rule and may be enforced by summary denial of motion where brief has not been filed. Hansen v. Kiernan, 159 M 448, 499 P 2d 787.

Rule 86. Effective date—Statutes superseded.

(a) **EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.** These Rules became effective January 1, 1962. In accordance with Chapter 16, Laws of 1963, proposed amendments to these rules shall be first prepared by the advisory committee, which shall distribute copies thereof to the bench and resident bar of the state for their consideration and suggestions. Submission of proposed amendments to the court shall be made by the advisory committee only after the advisory committee has considered suggestions received from the bench and bar. Submissions to the court shall be noticed by the court by mailing notice, containing copies of the submitted proposals to all district judges and resident attorneys licensed to practice in the Montana courts as shown by the records of the clerk of the court, and the court will receive written suggestions and objections within the time fixed in the notice, which shall be not less than ninety (90) days thereafter. Oral hearings on proposals will be held only on special order of the court. Amendments adopted by the court will become effective on January 1 unless a different time be fixed in the order.

The court will annually, at least thirty (30) days prior to January 1, cause to be published all amendments to these rules which are to become effective on the succeeding January 1, and transmit the same to all judges and resident lawyers of the state. Such rules as are to become effective at times other than January 1 will be published and transmitted at least thirty (30) days prior to their effective date. These rules and amendments govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the district court their application in a particular action pending when the rules or amendments take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

Amendment

The 1964 amendment divided subdivision (a) into two paragraphs; inserted the second, third, fourth, fifth, and sixth sentences of the first paragraph and the first and second sentences of the second paragraph; substituted "These rules and amendments" for "They" at the beginning of the third sentence of the second paragraph; inserted "or amendments" after "particular action pending when the rules" in the latter part of the third sentence of the second paragraph; and substituted "became effective" for "will take effect" in the first sentence of the first paragraph.

Relation Back of Complaint

Question of relation back of complaint amended after adoption of Rules is governed by provisions of Rules even though action originated prior to effective date of Rules in absence of finding by court hav-

ing jurisdiction that Rules should not control. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Retroactive Application

District court had the power to consider motion under procedure that was in effect when the motion was filed where the court believed application of amended rule would work an injury. *State ex rel. Rozan v. District Court of Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21.

Rule 4B(1), M. R. Civ. P., applied to act of alleged malpractice occurring in Montana prior to effective date of the Montana Rules of Civil Procedure and doctor who had not resided in Montana since the effective date of the rules could properly be served with process, under Rule 4D(3), in California. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 110.

The giving effect to the service of summons provisions of Montana Rules of Civil Procedure, Rule 4, subd. B, when

the operative facts of the case to which the rule applied had taken place prior to the effective date provided in this section, was not a prohibited retroactive application of Rule 4, subd. B, within the meaning of section 12-201. *Weber v. Hydroponics, Inc.*, 226 F Supp 117, 118.

References

Steffes v. Crawford, 143 M 43, 386 P 2d 842.

(b) **STATUTES SUPERSEDED.** Upon the taking effect of these rules or amendments thereto all statutes and parts of statutes in conflict therewith and the statutes listed in Tables B and C are superseded in respect of practice and procedure in the district courts.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

Amendment

The 1964 amendment inserted "or amendments thereto" after "these rules"; and made another minor change in phraseology.

Table A. Special statutory proceedings under Rule 81.

Compiler's Notes

A number of sections referred to in this table have been repealed.

Sections 23-926 to 23-928 were repealed by Sec. 248, Ch. 368, Laws of 1969; for similar provisions, see sec. 23-3316.

Sections 23-2301 to 23-2304 were repealed by Sec. 248, Ch. 368, Laws of 1969; for similar provisions, see secs. 23-4101, 23-4104 to 23-4109.

Section 38-606 was repealed by Sec. 1, Ch. 310, Laws of 1969; for present law, see sec. 69-6401 et seq.

Sections 38-701 to 38-711 were repealed by Sec. 15, Ch. 112, Laws of 1963, Sec. 82, Ch. 266, Laws of 1963, and Sec. 10, Ch. 213, Laws of 1963; for present law, see sec. 80-2404.

Sections 38-801 to 38-819 were repealed by Sec. 82, Ch. 266, Laws of 1963, Sec. 10, Ch. 213, Laws of 1963, and Sec. 101, Ch. 199, Laws of 1965; for present law, see secs. 80-2303 to 80-2312.

Sections 38-1101 to 38-1112 were repealed by Sec. 1, Ch. 230, Laws of 1959, and Sec. 101, Ch. 199, Laws of 1965; for present law, see secs. 80-2501 to 80-2503.

Section 40-3633 was repealed by Sec. 37, Ch. 362, Laws of 1969; for present law, see sec. 40-3664.

Section 66-1004 was repealed by Sec. 43, Ch. 338, Laws of 1969.

Sections 69-307 to 69-310 and 69-313 were repealed by Sec. 28, Ch. 264, Laws of 1955, and Sec. 223, Ch. 197, Laws of

1967; for present provisions, see secs. 69-4301 to 69-4317.

Section 69-522 was repealed by Sec. 223, Ch. 197, Laws of 1967; for present law, see sec. 69-4418.

Section 69-1335 was repealed by Sec. 223, Ch. 197, Laws of 1967; for similar provisions, see secs. 69-4816 and 69-4907.

Section 75-1634 was repealed by Sec. 496, Ch. 5, Laws of 1971; for present law, see sec. 75-8205.

Section 75-2901 was repealed by Sec. 496, Ch. 5, Laws of 1971; for present law, see sec. 75-6303.

Sections 75-3001 and 75-3002 were repealed by Sec. 16, Ch. 262, Laws of 1971.

Sections 80-810 and 80-815 to 80-817 were repealed by Sec. 82, Ch. 206, Laws of 1963, Sec. 242, Ch. 147, Laws of 1963, and Sec. 101, Ch. 199, Laws of 1965; for similar provisions, see sec. 80-2202 et seq.

Sections 80-1002 and 80-1003 were repealed by Sec. 101, Ch. 199, Laws of 1965.

Section 84-5617 was repealed by Sec. 32, Ch. 140, Laws of 1969; for a similar provision, see sec. 84-5606.25.

Section 94-101-1 to 94-101-33 were repealed by Sec. 2, Ch. 196, Laws of 1967; for new law, see secs. 95-2701 to 95-2713, 95-2715, and 95-2716.

Sections 94-901-1 to 94-901-18 were repealed by Sec. 3, Ch. 208, Laws of 1961; for new provisions, see secs. 93-2601-41 to 93-2601-82.

Table B. List of Rules Superseding Statutes.

Rule	Statutes Superseded (R. C. M. 1947, sections)
4D	16-809, 93-3008, 93-3011, 93-3012
41(e)	93-3002
52(a)	93-5302, 93-5303, 93-5411
52(b)	93-5305, 93-5306, 93-5307

59(a), (b), (c), (d) -----93-5605, 93-5606

History: En. Sec. 82, Ch. 13, L. 1961; amd. Sec. 3, Ch. 14, L. 1963; amd. Sec. 2, Ch. 190, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The 1965 amendment added sections 16-809, 93-3008, 93-3011, and 93-3012 to the

list of sections superseded by Rule 4 D; and added section 93-3002 to the list of sections superseded by Rule 41(e).

The 1969 amendment added section 93-5302 to the list of sections superseded by Rule 52(a); inserted sections 93-5305, 93-5306, and 93-5307 as being superseded by Rule 52(b); added section 93-5606 to the list of sections superseded by Rule 59(d).

Table C. List of Statutes Superseded by Rules.

Statutes Superseded (R. C. M. 1947, sections)	Rules
93-3002 -----	41(e)
93-3008 -----	4D
93-3011 -----	4D
93-3012 -----	4D
93-5302 -----	52(a)
93-5305 -----	52(b)
93-5306 -----	52(b)
93-5307 -----	52(b)
93-5606 -----	59(d)
16-809 -----	4D

History: En. Sec. 83, Ch. 13, L. 1961; amd. Sec. 4, Ch. 14, L. 1963; amd. Sec. 3, ch. 190, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The 1965 amendment added sections 16-809, 93-3002, 93-3008, 93-3011, and 93-3012 to the table.

The 1969 amendment added sections 93-5302, 93-5305 to 93-5307 and 93-5606 to the table.

CHAPTER 2901—SUPPORT OF CHILDREN BORN OUT OF WEDLOCK

93-2901-1. Obligations of the father.

NOTE.—Uniform State Law. Sections 93-2901-1 to 93-2901-11 constitute the “Uniform Act on Paternity” approved by the National Conference of Commission-

ers on Uniform State Laws and the American Bar Association in 1960 and adopted in substance in Kentucky and Mississippi.

CHAPTER 3001
MONTANA RULES OF APPELLATE CIVIL PROCEDURE

I. APPLICABILITY OF RULES

Rule

1. Scope of rules—From what judgment or order an appeal may be taken.
2. What the court may review on an appeal from a judgment.
3. Suspension of the rules.

**II. APPEALS FROM JUDGMENTS AND ORDERS OF
DISTRICT COURTS**

4. How taken.
 - (a) FILING THE NOTICE OF APPEAL.
 - (b) JOINT APPEALS.
 - (c) CONTENT OF THE NOTICE OF APPEAL.
 - (d) SERVICE OF NOTICE OF APPEAL.
5. Time for filing notice of appeal.
6. Undertaking for costs on appeal.
 - (a) [FORM OF UNDERTAKING—TIME FOR FILING.]
7. Stay of judgment or order pending appeal.
 - (a) [STAY UPON ENTRY OF JUDGMENT—UNDERTAKING.]
 - (b) [SALE OF PERISHABLE PROPERTY.]
 - (c) [CASES IN WHICH STAY OF PROCEEDINGS NOT ALLOWED.]
8. Sureties and their justification.
 - (a) [LIABILITY OF SURETY—ENFORCEMENT.]
 - (b) [JUSTIFICATION OF SURETIES.]
9. The record on appeal.
 - (a) COMPOSITION OF THE RECORD ON APPEAL.
 - (b) THE TRANSCRIPT OF PROCEEDINGS—DUTY OF APPELLANT TO ORDER—NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED—COSTS OF PRODUCING.
 - (c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE.
 - (d) AGREED STATEMENT AS THE RECORD ON APPEAL.
 - (e) CORRECTION OR MODIFICATION OF THE RECORD.
 - (f) [FINDINGS OF FACT AND CONCLUSIONS OF LAW.]
10. Transmission of the record.
 - (a) TIME FOR TRANSMISSION—NUMBER OF COPIES OF TRANSCRIPT—DUTY OF APPELLANT.

RULES OF APPELLATE CIVIL PROCEDURE

Rule

- (b) DUTY OF CLERK TO TRANSMIT THE RECORD.
 - (c) EXTENSION OF TIME FOR TRANSMISSION OF THE RECORD—REDUCTION OF TIME.
 - (d) RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT.
 - (e) STIPULATION OF PARTIES THAT PARTS OF THE RECORD BE RETAINED IN THE DISTRICT COURT.
 - (f) RECORD FOR PRELIMINARY HEARING IN THE SUPREME COURT.
11. Docketing the appeal—Filing of the record.
- (a) DOCKETING THE APPEAL.
 - (b) FILING OF THE RECORD.
 - (c) DISMISSAL FOR FAILURE OF APPELLANT TO CAUSE TIMELY TRANSMISSION OR TO DOCKET APPEAL.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

III. ORIGINAL PROCEEDINGS—EXTRAORDINARY WRITS

17. Acceptance and manner of conducting.
- (a) WHEN ACCEPTED.
 - (b) HOW COMMENCED AND CONDUCTED.
 - (c) APPLICATIONS—WHEN FILED.
 - (d) APPLICATIONS—WHAT TO CONTAIN.
 - (e) APPLICATIONS—HOW AND WHEN PRESENTED.
 - (f) ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE.
 - (g) BRIEFS.
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IV. APPEALS IN FORMA PAUPERIS

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- (a) APPLICATION TO DISTRICT COURT.
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 - (c) FORM OF BRIEFS, APPENDICES AND OTHER PAPERS.

V. GENERAL PROVISIONS

19. Record of commissions and oaths.
- (a) COMMISSIONS AND OATHS.
 - (b) MINUTES OF COURT.

RULES OF APPELLATE CIVIL PROCEDURE

Rule

20. Filing and service.

- (a) FILING.
- (b) SERVICE OF ALL PAPERS REQUIRED.
- (c) MANNER OF SERVICE.
- (d) PROOF OF SERVICE.

21. Computation and extension of time.

- (a) COMPUTATION OF TIME.
- (b) EXTENSION OF TIME.
- (c) ADDITIONAL TIME AFTER SERVICE BY MAIL.

22. Motions.

23. Briefs.

- (a) BRIEF OF THE APPELLANT.
- (b) BRIEF OF THE RESPONDENT.
- (c) REPLY BRIEF.
- (d) REFERENCES IN BRIEFS TO PARTIES.
- (e) REFERENCES IN BRIEFS TO THE RECORD.
- (f) REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC.
- (g) LENGTH OF BRIEFS AND COSTS.
- (h) BRIEFS IN CASES INVOLVING CROSS APPEALS.

24. Brief of an amicus curiae.

25. The appendix to the briefs.

- (a) USE OF AN APPENDIX.
- (b) CONTENTS OF THE APPENDIX.
- (c) ARRANGEMENT OF THE APPENDIX.
- (d) REPRODUCTION OF EXHIBITS.

26. Filing and service of briefs.

- (a) TIME FOR FILING BRIEFS.
- (b) NUMBER OF COPIES TO BE FILED AND SERVED.
- (c) CONSEQUENCES OF FAILURE TO FILE BRIEFS.

27. Form of briefs, the appendix, motions and other papers.

- (a) FORM OF BRIEFS, APPENDICES AND SEPARATE VOLUMES OF EXHIBITS.
- (b) TYPEWRITTEN PAPERS AND MOTIONS.
- (c) FIRST PAGE AND COVER.

28. Prehearing conference.

29. Oral argument.

- (a) NOTICE OF HEARING—POSTPONEMENT.
- (b) TIME ALLOWED FOR ARGUMENT.
- (c) ORDER AND CONTENT OF ARGUMENT.
- (d) CROSS AND SEPARATE APPEALS.

RULES OF APPELLATE CIVIL PROCEDURE

Rule

- (e) NONAPPEARANCE OF COUNSEL—FAILURE TO FILE BRIEFS.
 - (f) SUBMISSION ON BRIEFS.
 - (g) USE OF PHYSICAL EXHIBITS AT HEARING—REMOVAL.
30. Entry and notice of orders and judgments.
- (a) ENTRY AND NOTICE.
31. Interest on judgments.
32. Damages for appeal without merit.
33. Costs.
- (a) COSTS ON APPEAL.
 - (b) COSTS OF BRIEFS AND APPENDICES.
 - (c) OTHER COSTS TAXABLE.
 - (d) COSTS IN ORIGINAL PROCEEDINGS.
 - (e) UNNECESSARY COSTS.
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35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.
- (a) NOTICE AND COPY OF DECISION TO BE FURNISHED.
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38. Cases involving constitutional questions where the state is not a party.
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40. Appeals from injunction orders.
41. Statutes and rules amended.

Rule

42. Applicability in general.

- (a) SPECIAL STATUTORY PROCEEDINGS.
- (b) APPEALS TO DISTRICT COURTS.
- (c) RULES INCORPORATED INTO STATUTES.

43. Title—Effective date—Statutes superseded.

- (a) TITLE.
- (b) EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.
- (c) STATUTES AND RULES SUPERSEDED.

Appendix of forms.

Table A. List of statutes and rules superseded or amended.

- B. List of rules of appellate civil procedure superseding, in whole or in part, or amending, statutes and rules.
- C. List of statutes and rules superseded, in whole or in part, or amended, by designated rules of appellate civil procedure.

I. APPLICABILITY OF RULES

- Rule 1. Scope of rules—From what judgment or order an appeal may be taken.
- 2. What the court may review on an appeal from a judgment.
 - 3. Suspension of the rules.

Rule 1. Scope of rules—From what judgment or order an appeal may be taken.

These rules govern procedure in appeals in civil cases to the supreme court of Montana from Montana district courts and original proceedings in the supreme court of Montana. The party applying for original relief is known as the petitioner and the adverse party as the defendant. The party appealing is known as the appellant, and the adverse party as the respondent.

A party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:

(a) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.

(b) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order

directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.

(c) From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of any estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under R. C. M. 1947, section 93-2906 subdivisions 2, 3 or 4 thereof may be raised and reviewed on an appeal from the judgment.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967, in clause (b), inserted "or refusing to permit an action to be maintained as a class action;" near the beginning of the first sentence.

Advisory Committee's Note

Section 93-8003, R. C. M. 1947, is restated and clarified. The effect of section 93-8004 (3), referring to "an order changing or refusing to change a place of trial," is limited by providing for appeals from orders re change of venue only in cases where the motion for change is based upon subdivision 1 of section 93-2906.

Since these rules only apply to appeals from district courts to the Montana supreme court, the provisions of sections 93-8001 and 93-8002 are not superseded in so far as they refer to appeals in actions in police or justice's courts: a judgment or order in a civil action in police or justice's courts, except when expressly made final, may be reviewed as prescribed in R. C. M. 1947, sections 93-7901 to 93-7908.

Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

This adds to appealable orders an order under Rule 23(c)(1), Montana Rules of Civil Procedure, refusing to permit a class action to be maintained as such. It does not permit appeal from an order permitting a class action to be maintained as such. See Advisory Committee's Note to Rule 23 of the Montana Rules of Civil Procedure.

Class Action

Writ of supervisory control granting relief from district court order permitting maintenance of class action was not justified since the order was subject to alteration or amendment as the matter progresses and since the question can be considered on appeal from final judgment. State ex rel. Anaconda Aluminum Co. v. District Court, 158 M 228; 490 P 2d 351.

Denial of Change of Venue

Specification of error arising from trial court's order denying motion for change of venue was not properly before supreme court because timely appeal was not made from order as required by rules. Sealey v. Majerus, 149 M 268, 425 P 2d 70.

Denial of Motion

Where district court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the three years required by

M. R. Civ. P., Rule 41(e) the order was not appealable under this rule. *State ex rel. Belwin, Inc. v. Davison*, 148 M 345, 420 P 2d 842, 844.

Writ of supervisory control was proper where lessor's motion to dismiss sublessees' action for breach of lease agreement, to which sublessees were not parties, was denied by the district court, the order denying the motion to dismiss not being appealable under this rule. *State ex rel. Buttrey Foods, Inc. v. District Court*, 148 M 350, 420 P 2d 845, 847.

Denial of Writ of Assistance

Although denial of writ of assistance, placing purchaser at sheriff's sale under mortgage foreclosure into possession of lands involved, by district court was appealable under rule either as "an order directing * * * surrender of property" or as "any special order made after final judgment," writ of supervisory control to compel the district court to issue writ of assistance was available as remedy since remedy by appeal was neither speedy nor adequate. *State ex rel. Foss v. District Court, Fourth Judicial District*, 152 M 73, 446 P 2d 707.

Dismissal of Action

The effect of a district court's order dismissing the action was substantially the same as a judgment for defendants and therefore appealable even though no formal judgment was entered. *Prentice Lumber Co. v. Hukill*, — M —, 504 P 2d 277, distinguishing *Payne v. Mountain*

States Telephone & Telegraph Co., 142 M 406, 385 P 2d 100, and *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

Order Denying Summary Judgment

Although order denying summary judgment is nonappealable at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect judgment are reviewable on subsequent appeal from final judgment. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

Standing As Aggrieved Party

Appellant, who first raised issue of the zoning classification of property involved in condemnation proceeding, lacked standing as "a party aggrieved" to complain of the state's subsequent emphasis on the zoning of the property as misleading jury into reaching erroneous verdict. *State Highway Commission v. Vaughn*, 155 M 277, 470 P 2d 967.

Writ of Supervisory Control

Although orders of district court striking two defenses from relator's answer and granting plaintiff summary judgment on issue of liability were not directly appealable under this section, writ of supervisory control was available as remedy. *State ex rel. Great Falls Nat. Bank v. District Court*, 154 M 336, 463 P 2d 326.

DECISIONS UNDER FORMER LAW

Dismissal of Action

An order granting a motion to dismiss was not appealable under former section 93-8003. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100; *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1; both distinguished in — M —, 504 P 2d 277, 279.

Injunctions and Restraining Orders

Order denying county commissioner's motion to quash temporary injunction against use of real property valuations made by private appraisal group and relied on by reclassification officer appointed by commissioners to determine 1965 tax assessment rolls was appealable under

former section 93-8003. *State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405, 19 ALR 3d 396.

Sustaining of Demurrer

Notwithstanding that former statute providing for appeals gave party against whom demurrer was sustained plain and speedy remedy by appeal, court would not dismiss application for supervisory writ where judgment sustaining demurrer also stayed proceedings and expressly accorded losing party right to apply for supervisory writ. *State ex rel. Cave Constr. Co. v. District Court, Third Judicial District*, 150 M 18, 430 P 2d 624.

Rule 2. What the court may review on an appeal from a judgment.

Upon appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted or objected to within the meaning of Rule 46 of the Montana Rules of Civil Procedure, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates R. C. M. 1947, section 93-8022.

Correction of Erroneous Judgment

Case would be remanded to district court for purpose of amending, by incorporating appropriate terms, a judgment which omitted defaulting codefendant who was jointly and severally liable on obligation. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

Denial of Change of Venue

Specification of error arising from trial court's order denying motion for change of venue was not properly before supreme court because timely appeal was not made from order as required by rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

Objections First Raised on Appeal

In condemnation proceedings by the state highway commission to condemn a

right of way for an interstate highway which divided ranch into two large tracts making an underpass necessary, alleged error of trial court in its preliminary order of condemnation of ordering commission at its own expense to install, construct and maintain the underpass on the ground that the commission had previously agreed to install the underpass, could not be raised for the first time on appeal where the question was not raised at the time of the trial in the lower court. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 496.

Order Denying Summary Judgment

Although order denying summary judgment is nonappealable order at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect the judgment are reviewable on subsequent appeal from final judgment. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

Rule 3. Suspension of the rules.

In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may, except as otherwise provided in Rule 21(b), suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 2 of the Federal Draft. Its purpose is explained by the Federal Advisory Committee's Note. Adjusted to state practice, this purpose is to make clear the power of the supreme court to expedite the deter-

mination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the supreme court to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 21(b) prohibits the supreme court from extending the time for taking appeal.

II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

Rule 4. How taken.

5. Time for filing notice of appeal.
6. Undertaking for costs on appeal.
7. Stay of judgment or order pending appeal.
8. Sureties and their justification.
9. The record on appeal.
10. Transmission of the record.
11. Docketing the appeal—Filing of the record.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

Rule 4. How taken.

(a) **FILING THE NOTICE OF APPEAL.** An appeal shall be taken by filing a notice of appeal in the district court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the supreme court deems appropriate, which may include dismissal of the appeal.

(b) **JOINT APPEALS.** If two or more persons are entitled to appeal from a judgment or order of the district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal as a single appellant.

(c) **CONTENT OF THE NOTICE OF APPEAL.** The notice of appeal shall specify the party or parties taking the appeal; and shall designate the judgment or order appealed from. Form 1 in the Appendix of Forms is a suggested form of notice of appeal.

(d) **SERVICE OF NOTICE OF APPEAL.** The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address, and shall mail a copy of the notice of appeal to the clerk of the supreme court. The clerk of the district court shall note on each copy served the date on which the notice of appeal was filed. If an appellant is represented by counsel, his counsel shall provide the clerk with sufficient copies of the notice of appeal to permit the clerk to comply with the requirements of this rule. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 3 of the Federal Draft, but excludes references to criminal cases, habeas corpus proceedings and bankruptcy. Nothing other than the filing of a notice of appeal in the district court is required for the perfecting of an appeal. In the interest of providing the supreme court with prompt

notice that its jurisdiction has been invoked, the rule directs the clerk of the district court to forward a copy of the notice of appeal to the clerk of the supreme court. The requirement that the appellant furnish the clerk with the necessary number of copies of the notice of appeal and that the clerk endorse on each copy served the date on which the notice was filed are for the convenience of the clerk and litigants respectively.

DECISIONS UNDER FORMER LAW**Service on Respondent**

Where notice of appeal was not served on the respondent party within six months of the date of judgment, the supreme court could not acquire jurisdiction

even though notice was filed with the district court within the statutory period. *Seiffert v. Police Commission of Helena*, 144 M 52, 394 P 2d 172.

Rule 5. Time for filing notice of appeal.

The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof, except that in cases where service of notice of entry of judgment is required by Rule 77(d)

of the Montana Rules of Civil Procedure the time shall be 30 days from the service of notice of entry of judgment, but if the state of Montana, or any political subdivision thereof, or an officer or agency thereof is a party the notice of appeal shall be filed within 60 days from the entry of the judgment or order or 60 days from the service of notice of the entry of judgment. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time otherwise provided by this rule, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the district court by any party pursuant to the Montana Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this rule commences to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967, in the first sentence of the first paragraph, inserted "a judgment or" before "an order"; substituted "except that * * * the time" for "and the time within which an appeal from a judgment must be taken"; deleted "as provided in Rule 77(d) of the Montana Rules of Civil Procedure" after "entry of judgment"; and inserted "or any political subdivision thereof" after "state of Montana."

Advisory Committee's Note

This rule is patterned after Rule 4 of the Federal Draft. (Provisions for appeals in bankruptcy, petitions for impeachment, under the Railway Labor Act, under the Interlocutory Appeals Act, and in criminal cases, are omitted.) It materially shortens the time for taking an appeal.

The Federal Draft provides that the notice of appeal shall be filed within 30 days "of the date of the entry of the judgment order appealed from." The change, which measures the time from service of notice of entry of the judg-

ment, is for the purpose of avoiding uncertainty as to what is a judgment and reducing the possibility of lack of knowledge of the entry of the judgment or order.

The provision for added time for appeal by other parties after notice of appeal is filed by one party is new. The Federal Advisory Committee Note explains this as follows: "It not infrequently happens that a party considers himself aggrieved by the final judgment but is willing to abide by it if it is to be the final result of the action. Such a party should be protected against the possibility that another party may file a final hour appeal and thereby oblige the forbearing party to undergo the expense of an appeal without the opportunity of presenting his own grievance" to the supreme court.

The time limit for taking an appeal would not prevent the taking of an appeal at any time after the entry of the judgment or order and before service of notice of entry.

The final paragraph permits an extension of the time for taking an appeal by the district court "upon a showing of excusable neglect." In view of the ease with which an appeal may be taken—the filing of a simple notice with the clerk of court—and the unlikelihood that there will not be actual notice of the entry of

the judgment or order, it would be an extraordinary case which would justify an extension. But the district court should have the authority to extend time in extraordinary cases where injustice would otherwise result. The phrase "by any party" makes it clear that the district court may extend the time allowed for filing a cross or separate appeal after an initial appeal has been filed.

Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

Since Rule 77(d), M. R. Civ. P., only requires service of notice of entry of judgment in cases where an appearance has been made, no time appears to be provided for filing notice of appeal from judgments in default cases. This amendment is designed to supply the deficiency.

The addition of the phrase, "or any

political subdivision thereof," is added to make it clear that the 60-day provision applies to cities, counties, etc.

Commencement of Sixty-Day Period

Sixty-day allotted period in which to file an appeal commenced to run the day after motion for new trial was deemed denied under the self-executing provision of Rule 59(d) which provides that a motion for a new trial which does not contain a notice of hearing and upon which no hearing is held is automatically denied ten days after service; district court clerk's letter mailed twenty-two days after service of notice stating that the motion for new trial had been denied had no effect on the commencement of the sixty-day period in which appellants had to file their appeal. *Leitheiser v Montana State Prison*, — M —, 505 P 2d 1203.

Rule 6. Undertaking for costs on appeal.

(a) [Form of undertaking—Time for filing]. Within 10 days after service of notice of appeal an undertaking for costs on appeal shall be filed in the district court, or a deposit of the money in the amount thereof be made with the clerk of the district court to abide the event of the appeal, or the undertaking be waived by the adverse party in writing. The undertaking must be executed on the part of the appellant by at least 2 sureties, or by a corporate surety as may be authorized by law, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding five hundred dollars. If the undertaking on appeal is not filed within the time specified, or if the undertaking filed is found insufficient, and if the action is not yet docketed with the supreme court, an undertaking may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file an undertaking may be made only in the supreme court. The undertaking for costs herein provided may be combined in a single document with a supersedeas bond under Rule 7.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

Rules 7 and 8 of the Federal Draft contain provisions for appeal bonds and the stay of judgments and orders. These provisions are not followed in the rule. Rather Rules 6, 7 and 8 hereof are substituted. These provisions are believed to be more in accord with state practice and to better fit into Montana statutes

than do the provisions of the Federal Draft. This rule supersedes R. C. M. 1947, sections 93-8005, 93-8006, 93-8012, 93-8015, and compares with Federal Rule 73(c) and (e).

The amount of the undertaking has remained at \$300 since 1895, and the rule would increase it to \$500. Also, express provision is made for corporate sureties as may be authorized by law. Such authorization is found in R. C. M. 1947, section 93-8711.

Rule 7. Stay of judgment or order pending appeal.

(a) [Stay upon entry of judgment—Undertaking]. Upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of the execution of the judgment or order. The court

in its discretion may grant said stay for such period of time and under such conditions as the court deems proper, including restraining the party from disposing of, encumbering, or concealing his property. Upon service of notice of appeal, if the court has made no such order or the appellant desires a stay for a longer period than ordered, he may present to the district court and secure its approval of a supersedeas bond which shall have such surety or sureties as are required for an undertaking for costs on appeal prescribed by Rule 6(a). The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. On application, the supreme court in the interest of justice may suspend, modify, restore, or grant any order made under this subdivision.

(b) [Sale of perishable property]. If the judgment or order appealed from directs the sale of perishable property, the district court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the supreme court.

(c) [Cases in which stay of proceedings not allowed]. No stay of proceedings shall be allowed upon a judgment or order which adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state; or which grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer, or board, commanding certain acts to be done which ought to be done by such tribunal, corporation, public officer, or board, and not involving the payment or allowance of money or its equivalent.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule supersedes subdivisions (a) and (d) of Rule 62 of the Montana Rules of Civil Procedure. It also supersedes section 93-8013 in so far as applicable to appeals from district courts to the supreme court. However, since these rules do not apply to appeals from police and

justices' courts, section 93-8013 is not superseded in so far as it provides that in cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908, "a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and . . . the undertaking or deposit may be waived by the written consent of the respondent." Also section

93-8014 is superseded, and subdivision (c) of this rule is patterned after the last part of that section.

The provision of this rule that, upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of execution, is designed to afford time to obtain a supersedeas bond during which the status quo is maintained by court order. The power of the supreme court recognized by the last sentence of subdivision (a) supplements the power of the district court.

Constitutional Power

Supreme court's constitutional power under 1889 Const., art. VIII, § 3, to issue writs necessary to the complete exercise of its appellate jurisdiction overrode the provision in subdivision (c) of this rule prohibiting stay of a writ of mandamus, and supreme court could stay a district

court writ of mandamus ordering the superintendent of banks to issue a bank charter since a stay was necessary to make the right of appeal effectual. *State ex rel. Bennett v. Dowdall*, 157 M 11, 482 P 2d 572.

Supersedeas Bond

Failure of defendant to file supersedeas bond pursuant to this section resulted in dismissal of appeals since such bond is only method to stay execution of judgment and after judgment is paid, it passes beyond review. *Gallatin Trust & Savings Bank v. Henke*, 154 M 170, 461 P 2d 448.

An application for reduction in the amount of a supersedeas bond should be submitted to the district court that set the amount. *State ex rel. Adams v. District Court of Ninth Judicial District in and for County of Teton*, 155 M 309, 471 P 2d 537.

DECISIONS UNDER FORMER LAW

Eminent Domain Proceeding

Where state highway commission filed notice of appeal and perfected its appeal after writ of execution under section 93-9918 had issued, the appeal stayed the

judgment although no bond was filed as required by this section, since under Rule 62(e), no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

Rule 8. Sureties and their justification.

(a) [Liability of surety—Enforcement]. In cases where an undertaking on appeal or supersedeas bond with sureties is required, the provisions of R. C. M. 1947, sections 93-8710 to 93-8715, inclusive, apply. By entering into an undertaking on appeal or supersedeas bond given pursuant to Rules 6 and 7, the surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of any independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of that court, who shall forthwith mail copies to each surety whose address is known.

(b) [Justification of sureties]. A party may except to the sufficiency of the sureties to any bond or undertaking mentioned in this rule at any time within 30 days after the filing of such bond or undertaking; and unless they or other sureties, within 20 days after service of notice of such exception, justify before a judge of the district court, or the clerk thereof, upon 5 days' notice to the other parties of the time and place of justification, execution of the judgment or order appealed from is no longer stayed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

The provisions of subdivision (a) of the rule with respect to proceedings against sureties is patterned after Rule

8(b) of the Federal Draft. Subdivision (b) of the rule follows the existing Montana practice provided by R. C. M. 1947, section 93-8013, but the language is changed to avoid confusion where there are cross appeals or mixed forms of relief and to make it clear that either ap-

pellant or respondent, or both, may except to the sufficiency of sureties on a bond or undertaking furnished by the other.

Rule 9. The record on appeal.

(a) COMPOSITION OF THE RECORD ON APPEAL. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) THE TRANSCRIPT OF PROCEEDINGS—DUTY OF APPELLANT TO ORDER—NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED—COSTS OF PRODUCING. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within 10 days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the payment of such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.

(c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within 10 days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A

judge may settle and approve such record after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct.

(d) **AGREED STATEMENT AS THE RECORD ON APPEAL.** In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 10. Copies of the agreed statement may be filed as the appendix required by Rule 25.

(e) **CORRECTION OR MODIFICATION OF THE RECORD.** If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the supreme court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

(f) **[FINDINGS OF FACT AND CONCLUSIONS OF LAW.]** In all nonjury cases where judgment is rendered on the basis of findings of fact and conclusions of law such findings and conclusions by the district court should be incorporated in the appendix to appellant's brief, along with the district court's opinion, if any.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1971 amendment added subdivision (f).

Advisory Committee's Note

This rule is patterned after Rule 10 of the Federal Draft.

Subdivision (a). This subdivision provides for the use of the original trial record as the official record on appeal, and judgment rolls are nowhere provided for in these Rules. This use of the trial record is now provided for in all federal circuit courts.

Subdivision (b). The Federal Advisory Committee's Note states: "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of the issues presented by the appeal. Such a statement is not the equivalent of an assignment of errors, which is nowhere required in the proposed rules, and the statement would not result in limiting the issues on appeal. The precise statement of the issues presented by the appeal is to be made in the brief. An appellee who can show that he was misled by the statement required by this subdivision and in consequence failed to des-

ignate for transcription material parts of the reported proceedings may seek relief under subdivision (e) of this rule."

The second and third sentences of this subdivision following the title are added to the Federal Draft to make the duty which rests on the appellant more specific. Also, the second paragraph of this subdivision has been expanded to afford protection to an appellant against payment of costs of a transcript of unnecessary portions of the proceeding ordered by a respondent. And the last paragraph, requiring the reporter to certify the correctness of the transcript, has been added to the Federal Draft.

Subdivision (c). The provision of the Federal Draft for settlement has been expanded, patterned after section 93-5508; also, because memories are short, there has been added a time limit for the preparation of the statement.

Subdivisions (d) and (e) are the same as the provisions of the federal draft, adjusted to the Montana court system.

Cost of Transcript

Under rule providing that court "may impose upon the respondent the cost of producing any part of the record which it deems unnecessary for the determination

of the issues," court determined that cost of portion of transcript ordered by respondent, which did not bear on any issue presented upon appeal, should be assessed against respondent. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

Failure to Perfect Appeal

Appeal was dismissed where appellants had failed to request parts of the transcript within the time allowed by subdivision (b) of this rule, had not requested preparation of any portion of the record on appeal, had failed to pay for copies of documents requested or portions of the transcript prepared, had failed to transmit any part of the record on appeal to the supreme court, had failed to docket the appeal or pay the docket fee, and had failed, within the time allowed by the chief justice, to replace counsel desiring to withdraw with good cause. *Larry C. Iverson, Inc. v. United Bank of Pueblo*, 158 M 223, 490 P 2d 352.

Appeal was dismissed for inadequacy of record where there was no statement of the evidence and sufficiency of evidence was in issue, even though appellant contended that only an issue of law was presented. *Washington v. Washington*, — M —, 507 P 2d 1071.

DECISIONS UNDER FORMER LAW

Evidence Not in Record

Merits of appeal could not be determined where purported transcript on appeal did not contain certificate of judge that records included in the transcript had been used at the hearing. *Anderson v. Mennie*, 144 M 105, 394 P 2d 853, 854.

Late Presentment of Bill

A bill of exceptions presented after the time prescribed in former section 93-5505 was a nullity and could not be considered on appeal. *Anderson v. Mennie*, 144 M 105, 394 P 2d 853, 854.

Notice of Appeal

Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the supreme court acquired no jurisdiction to allow such amendment when the statutory provisions for time and manner of appeal were not complied with. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100.

Rule 10. Transmission of the record.

(a) **TIME FOR TRANSMISSION—NUMBER OF COPIES OF TRANSCRIPT—DUTY OF APPELLANT.** The record on appeal, including the transcript necessary for the determination of the appeal, shall be transmitted to the supreme court within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (c) of this rule. Six copies of each transcript must be lodged with the clerk of this court for filing. Promptly after filing the notice of appeal the appellant shall comply with the provisions of Rule 9(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is filed, each appellant shall comply with the provisions of Rule 9(b) and

this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) DUTY OF CLERK TO TRANSMIT THE RECORD. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the supreme court. The clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerk of the district court for the transportation of bulky or weighty exhibits and with the clerk of the supreme court for their receipt. Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the supreme court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the supreme court.

(c) EXTENSION OF TIME FOR TRANSMISSION OF THE RECORD—REDUCTION OF TIME. The district court may extend the time for transmitting the record. The request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT. The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) **STIPULATION OF PARTIES THAT PARTS OF THE RECORD BE RETAINED IN THE DISTRICT COURT.** The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(f) **RECORD FOR PRELIMINARY HEARING IN THE SUPREME COURT.** If prior to the time the record is transmitted a party desires to make in the supreme court a motion for dismissal, for a stay pending appeal, for additional security on the undertaking on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the supreme court such parts of the original record as the party shall designate.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 11 of the Federal Draft.

Subdivision (a). This subdivision fixes the time for transmission rather than for filing at 40 days after the filing of the notice of appeal, thus enabling the parties to know with certainty precisely when the complete record must be transmitted to the supreme court. The only justification for delay between filing the notice of appeal and the transmission of the record to the supreme court is the time required for securing a transcription of the trial proceedings. If the appellant is prevented from securing the necessary transcript within the 40-day period by circumstances beyond his control, he may seek an extension of time for transmitting the record.

The requirement that the appellant take any other action necessary to enable the clerk to assemble and transmit the record emphasizes the primary responsibility of the appellant for effecting timely transmission of the record. His responsibilities include, for example, the payment of any required fee or charge.

Subdivision (b). The appellant is allowed 40 days between the filing of the notice of appeal and the transmission of the record in order to allow him to secure the necessary transcript. If the transcript is available sooner, the allowance is unnecessary, and either party may oblige the clerk of the district court to transmit the record forthwith. On the other hand, unless the record contains the necessary transcript, the clerk is not to transmit it.

Subdivision (c). Cause for extension of the time by either the district or the supreme court must be shown. The final sentence permits any party to expedite the appeal in cases in which the record is complete by obtaining an order that the record be transmitted and the appeal docketed at a date earlier than otherwise allowed or fixed.

Subdivision (d). This subdivision permits the record to be retained in the district court by order of the supreme court, or order of the district court subject to the order of the supreme court. Especially in cases where the judgment or order does not dispose of the entire litigation, retention of the record in the district court may be a convenience for counsel and the district court. In some cases there may be no need for the transmission of the record, and the labor and expense of transmission may be saved.

Subdivision (e). This subdivision permits parties to stipulate against transmission of designated parts of the record free from the fear that a mistake may substantially affect the scope of the appeal. The final sentence makes it clear that a stipulation that designated parts of the record not be transmitted in no way diminishes the record itself. In effect, a party may at any time revoke his stipulation against transmission of parts of the record.

Subdivision (f). The substance of this subdivision was taken from Fed. R. Civ. P., Rule 75(j).

Dismissal of Appeal

Appeal was dismissed where appellants had not transmitted any part of the record on appeal within the time required by

subdivision (a) of this rule, had not applied for an extension of time, had not requested parts of the transcript from the district court clerk within the time allowed, had not requested preparation of any part of the record on appeal, had not paid for copies of documents requested or portions of the transcript prepared, had not docketed the appeal or paid the docket fee, and had failed, within the time allowed by the chief justice, to replace counsel desiring to withdraw with good cause. *Larry C. Iverson, Inc. v. United Bank of Pueblo*, 158 M 223, 490 P 2d 352.

Enforcement of Rule

Supreme Court refused to dismiss appeal for failure to file record within time limit where appellant-defendant had been granted the appellant over 130 days in the record, but through error of defendant or district court, the order granted a ninety-day extension for filing which to file record and where appellant at the end of that period moved for a thirty-day extension which was granted and on the day of that motion filed the record. *Hannifin v. Retail Clerks International Assn.*, — M —, 511 P 2d 982.

Rule 11. Docketing the appeal—Filing of the record.

(a) **DOCKETING THE APPEAL.** Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the supreme court the fee for filing the record on appeal fixed by section 82-503 of the 1947 Revised Codes of Montana, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at or before the time of filing the record. An appeal shall be docketed under the title given to the action in the district court with such addition as is necessary to indicate the identity of the appellant.

(b) **FILING OF THE RECORD.** Upon receipt of the record by the clerk of the supreme court following its timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) **DISMISSAL FOR FAILURE OF APPELLANT TO CAUSE TIMELY TRANSMISSION OR TO DOCKET APPEAL.** If the appellant shall fail to cause timely transmission of the record or to pay the filing fee if a filing fee is required, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that 7 days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion, without requiring payment of the filing fee, but the appellant shall not be permitted to appear without payment of the fees unless he is otherwise exempt therefrom. Instead of filing a motion to dismiss the appeal, the respondent may cause the record to be transmitted and may docket the appeal, in which event the appeal shall proceed as if the appellant had caused it to be docketed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 12 of the Federal Draft, with adjustments to

state practice. The provision of section 82-503 for a fee for filing the "transcript" on appeal will apply to the "record" on appeal pursuant to these rules.

The appellant's responsibility with respect to docketing and filing are specified. The appellant may pay the filing fee at any time after filing the notice of appeal, and it is then the duty of the clerk of the supreme court to enter the appeal on the docket. The appellant's responsibility is (1) to pay the filing fee at or before the time allowed or fixed for transmission of the record, and (2) to insure that the record is transmitted to the supreme court within the time allowed or fixed for its transmission. The clerk of the supreme court is directed to assign to cases on appeal the title which was used in the district court in the interest of facilitating

future reference and citation and location of cases in indexes.

Dismissal of Appeal

Appeal was dismissed where appellants had failed to docket the appeal or pay the docket fee, had not requested parts of the transcript within the time allowed, had not requested preparation of any part of the record on appeal, had not paid for copies of documents requested or portions of the transcript prepared, had not transmitted any part of the record on appeal to the supreme court, and had not, within the time allowed by the chief justice, replaced counsel desiring to withdraw for good cause. *Larry C. Iverson, Inc. v. United Bank of Pueblo*, 158 M 223, 490 P 2d 352.

DECISIONS UNDER FORMER LAW

Notice of Appeal

Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the supreme court acquired no jurisdiction to allow such amendment

when the statutory provisions for time and manner of appeal were not complied with. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100.

Rule 12. Effect of dismissal.

The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates R. C. M. 1947, section 93-8020.

Rule 13. Acts of executors, administrators or guardians valid when appointment vacated.

When the judgment or order appointing an executor, or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates R. C. M. 1947, section 93-8016.

Rule 14. Ruling against respondent may be reviewed.

Whenever the record on appeal shall contain any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with any required objection or exception of such respondent, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties,

as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the trial court against the appellant, where the record shows that the same result would have been attained had such trial court not committed an error or errors against the respondent.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates R. C. M. 1947,

section 93-8023, but eliminates references to bills of exceptions and statements of the case properly settled because these rules nowhere provide for such bills and statements.

Rule 15. Remedial powers of the supreme court.

When the judgment or order is reversed or modified, the supreme court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on an appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates R. C. M. 1947,

section 93-8024, substituting "supreme court" for "appellate court" and eliminating the provision for damages when the appeal is made for delay. Rule 32 covers the matter of damages.

Rule 16. Remittitur must be certified to the clerk of the district court.

When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk of the district court from which the appeal is taken. The clerk of the district court must enter at length in the records of the court the certificate received. Also, in cases of appeal from a judgment, the clerk must enter a minute of the judgment of the supreme court on the docket against the original entry; and in cases of appeal from an order, he must enter a minute against the entry of the order appealed from, containing a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates the substance of

R. C. M. 1947, section 93-8025, but eliminates references to the judgment roll, which is nowhere provided for in these rules.

III. ORIGINAL PROCEEDINGS—EXTRAORDINARY WRITS

Rule 17. Acceptance and manner of conducting.

Rule 17. Acceptance and manner of conducting.

(a) **WHEN ACCEPTED.** The supreme court is an appellate court but it is empowered by the constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original

proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

(b) HOW COMMENCED AND CONDUCTED. Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, supervisory control, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the Code of Civil Procedure for the conduct of such or analogous proceedings and by these additional rules. All papers filed shall conform to the requirements of Rule 27, except typewritten applications, briefs, copies of exhibits and the like may be used without securing permission of the chief justice as required by Rule 27(a). The provisions of Rule 27(b) shall be observed.

(c) APPLICATIONS—WHEN FILED. The moving party's application shall be filed with the clerk of the supreme court one hour prior to its presentation to the court.

(d) APPLICATIONS—WHAT TO CONTAIN. The application for the issuance of any of the above writs or orders must set forth, in addition to the other requisite matters, the particular questions and issues anticipated or expected to be raised in the proceeding, and also the fact which renders it necessary and proper that the writ should issue originally from the supreme court; the said matters will be taken into consideration by the court in determining the necessity and propriety of accepting jurisdiction and granting the alternative writ or order to show cause. Each application shall also set forth as exhibits, without repetition of title of court and cause, a copy of each judgment, order, notice, pleading, document, proceeding or court minute referred to in the application, or necessary to make out a prima facie case or to substantiate the pleading or conclusion or legal effect. A memorandum of authorities must be filed with the application. On original applications counsel shall file with the clerk of this court the original court file, with the original application, unless for some reason the same is not available.

(e) APPLICATIONS—HOW AND WHEN PRESENTED. The supreme court will receive and hear original applications in open court on any day when the court is in session; but at least an hour's prior notice of such presentation shall be given by counsel to the chief justice or acting chief justice. Not over fifteen minutes shall be allowed for the presentation of any such application unless on prior request further time is granted.

(f) ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE. This court will, as promptly as possible after the presentation of an application, either dismiss the same, issue an alternative writ, order to show cause, or such other remedial writ or order as it deems expedient.

(g) BRIEFS. At or before the time set for final hearing, each party shall serve and file his brief in full conformance with Rules 20, 23

and 27, and containing a statement of the facts and of the points of law applicable, with the authorities relied upon.

(h) **HEARING—WHEN HAD.** Unless otherwise ordered the hearing shall be had at the time fixed for the return. At or prior to said return time the opposing party shall serve and file, without waiver, any and all pleadings and motions desired to be presented, including answer or return, and all issues shall be argued at the hearing, the applicant opening and closing, and the parties being allowed the same time as upon argument of appeals. If testimony becomes necessary a reference will be ordered.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1971 amendment added to the second sentence of subdivision (b) the clause excepting typewritten papers; added the third sentence to subdivision (b); and added the final sentence to subdivision (d).

Supreme Court Memorandum

In October, 1969, the Supreme Court issued a Memorandum to Counsel, reading as follows:

"In order to facilitate presentation and our consideration of applications prepared in accordance with Rule 17(d), M. R. App. Civ. P. for an original or remedial writ, in addition to the requirements of the rule, counsel should, if at all possible, bring to this Court the original district court file, together with transcript of any hearing, if the same has been reduced to writing, that has been had involving the matter sought to be inquired into.

"Compliance with this request will be appreciated."

See final sentence of subdivision (d) added by 1971 amendment.

Advisory Committee's Note

This rule incorporates Montana Supreme Court Rule IV, with changes in subdivisions (e) and (f) designed to recognize that on original applications the court is not limited to the issuance of alternative writs or orders to show cause, but may issue whatever remedial writ or order it deems appropriate.

Alternative Writs

State highway commission, ordered by district court to produce certain appraisals under discovery rules, was entitled to have order reviewed on allegations that order required production of irrelevant and privileged matter in excess of lower court's jurisdiction, that it was not an appealable

order and that commission had no remedy at law, which allegations were sufficient to authorize issuance of alternative writ. *State Highway Commission v. District Court, First Judicial District*, 149 M 384, 427 P 2d 49.

Declaratory Judgment

Minimum Wage Act was of such importance to all citizens of state and of such nature as to justify original proceeding in supreme court for declaratory judgment as to constitutionality and as to application to firemen and policemen. *City of Billings v. Smith*, 158 M 197, 490 P 2d 221.

Injunction

Supreme court declined jurisdiction in original proceeding seeking injunction restraining defendant school districts from collecting certain fees and levies and requiring students to purchase certain material because no emergency existed, class action could be established in district court and thorough examination into multiple problems presented could not have been achieved. *State ex rel. Thompson v. Elementary School Dist. No. 16, Hill County*, 156 M 79, 474 P 2d 700.

Needless Litigation Prevented

Writ of supervisory control was proper where district court orders requiring state highway commission to quiet title against all possible lien holders of land subject to condemnation and to use valuation date more than three years beyond the alleged proper date were not appealable until after final judgment and this would result in extended and needless litigation if district court was wrong. *State Highway Commission v. District Court*, — M —, 499 P 2d 1228.

Writ of Supervisory Control

Writ of supervisory control to compel dismissal of removal petition that could not be granted even if the facts alleged were proved was a necessary and proper supervision of district court. *State ex rel. Arnot v. District Court of First Judicial*

Rule 18(a) RULES OF APPELLATE CIVIL PROCEDURE

District In and For County of Lewis and Clark, 155 M 344, 472 P 2d 302.

References

State ex rel. Buttrey Foods, Inc. v. District Court, 148 M 350, 420 P 2d 845, 847.

IV. APPEALS IN FORMA PAUPERIS

Rule 18. Applications and manner of proceeding.

Rule 18. Applications and manner of proceeding.

(a) APPLICATION TO DISTRICT COURT. A party who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed together with an affidavit showing, in the detail prescribed by Form 2 of the Appendix of Forms, his inability to pay the fees and costs of the appeal or to give security therefor, his belief that he is entitled to redress, and a statement of the issues he intends to present on appeal. If the motion is granted, the party may proceed on appeal without further application to the supreme court and without payment of fees or costs or the giving of security therefor. If the motion is denied, the district court shall state the reasons for the denial.

(b) APPLICATION TO THE SUPREME COURT. If the motion for leave to proceed on appeal in forma pauperis is denied by the district court, a motion for leave so to proceed may be filed in the supreme court within 30 days after entry of the order of denial. The motion shall be accompanied by a copy of the affidavit filed in the district court and of the statement of reasons for denial given by the district court.

(c) FORM OF BRIEFS, APPENDICES AND OTHER PAPERS. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 23 of the Federal Draft, but omits the last clause of the Federal Draft reading "and

may request that the appeal be heard on the original record without an 'appendix'." This change is made because these rules do not adopt the appendix system of Rule 30 of the Federal Draft. See Rule 25. This rule is believed to be consistent with R. C. M. 1947, section 93-8625.

V. GENERAL PROVISIONS

- Rule 19. Record of commissions and oaths.
20. Filing and service.
21. Computation and extension of time.
22. Motions.
23. Briefs.
24. Brief of an amicus curiae.
25. The appendix to the briefs.
26. Filing and service of briefs.
27. Form of briefs, the appendix, motions and other papers.
28. Prehearing conference.
29. Oral argument.
30. Entry and notice of orders and judgments.
31. Interest on judgments.
32. Damages for appeal without merit.
33. Costs.
34. Petitions for rehearing.

35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.
36. Voluntary dismissal.
37. Substitution of parties.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar—Withdrawal of records.
40. Appeals from injunction orders.
41. Statutes and rules amended.
42. Applicability in general.
43. Title—Effective date—Statutes superseded.

Rule 19. Record of commissions and oaths.

(a) COMMISSIONS AND OATHS. The commissions and oaths of the justices and the clerk of this court, and the attorney general shall be recorded in the records of this court.

(b) MINUTES OF COURT. The minutes of this court shall be approved by the chief justice (or in his absence by the associate justice having the shortest term to serve), and attested by the clerk.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates Montana Supreme Court Rule I.

Rule 20. Filing and service.

(a) FILING. Papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are actually received within the time fixed for filing. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the dates of filing and shall thereafter transmit it to the clerk.

(b) SERVICE OF ALL PAPERS REQUIRED. Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) MANNER OF SERVICE. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) PROOF OF SERVICE. Papers presented for filing shall contain acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 25 of the Federal Draft, but the phrase "in-

Rule 21(a) RULES OF APPELLATE CIVIL PROCEDURE

cluding any transcript" has been added to subdivision (b) to make it clear that copies of any transcript are to be served on all parties. The first paragraph of Montana Supreme Court Rule III is superseded.

Rule 21. Computation and extension of time.

(a) **COMPUTATION OF TIME.** In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **EXTENSION OF TIME.** The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, and may thereby permit an act to be done after the expiration of such time if the failure to act was excusable under the circumstances; but the court may not extend the time for filing a notice of appeal, except as provided in Rule 5.

(c) **ADDITIONAL TIME AFTER SERVICE BY MAIL.** Whenever a party is required or permitted to do any act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 26 of the Federal Draft. There are omitted provisions of the Federal Draft with respect to petitions for allowance, applica-

tions for permission to appeal, appeals from advisory agencies, and a definition of "legal holiday." A definition of "legal holiday" is contained in R. C. M. 1947, section 19-107.

It is believed that these provisions are consistent with R. C. M. 1947, section 90-407.

Rule 22. Motions.

Unless another form is prescribed by these rules, an application for an order or other relief shall be made by filing a motion in writing for such order or relief. The motion shall state with particularity the grounds therefor and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Motions for procedural orders may be determined ex parte. The supreme court may authorize disposition of motions for procedural orders by a single judge. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within 7 days after service of the motion, or within such time as the court may direct. Motions, supporting papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, together with sufficient copies for service upon all counsel of record.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule supersedes Montana Supreme Court Rule XI. It is patterned after

Rule 27 of the Federal Draft, but the last sentence of the Federal Draft requiring the filing of three copies of motions and supporting papers has been omitted. Also,

there has been added as a last paragraph the amendment of the Montana Supreme Court Rule XI, effective January 1, 1965.

Rule 23. Briefs.

(a) BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case and its disposition in the court below, e.g.: "The plaintiff brought this action in the district court to recover damages for the wrongful death of her husband. The jury returned a verdict for the plaintiff. On motion of the defendant the trial judge entered judgment for the defendant n. o. v. on the ground that there was no evidence to support a finding of negligence on the part of the defendant. From this judgment the plaintiff appeals."

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) BRIEF OF THE RESPONDENT. The brief of the respondent shall conform to the requirements of subdivision (a) (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) REPLY BRIEF. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.

(d) REFERENCES IN BRIEFS TO PARTIES. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) REFERENCES IN BRIEFS TO THE RECORD. Whenever a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e. g., Answer, p. 7; Motion for Summary Judgment, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.

(f) **REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC.** If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. No such reproduction is required, unless ordered by the supreme court. When the error alleged is to the charge of the court, the brief of the parties shall set out with appropriate transcript references the part referred to *totidem verbis*, whether it be directed to instructions given or instructions refused.

(g) **LENGTH OF BRIEFS AND COSTS.** Except by permission of the court briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. For purposes of assessing costs under R. C. M. 1947, section 93-8606, reasonable costs shall be limited as follows: For appellant's brief fifty (50) pages; for respondent's brief forty (40) pages; for reply brief fifteen (15) pages. In addition, reasonable costs for briefs shall be limited to \$250 for appellant's brief and \$200 for respondent's brief.

(h) **BRIEFS IN CASES INVOLVING CROSS APPEALS.** If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 25 and 26, unless the parties otherwise agree or the court otherwise orders. The brief of the respondent shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Amendments

The 1971 amendment added the third sentence to subdivision (f).

Advisory Committee's Note

This rule is patterned after Rule 28 of the Federal Draft, adjusted to state

practice. The second paragraph of subdivision (e) of the Federal Draft is omitted, since these rules do not adopt the "appendix" system of Rule 30 of the Federal Draft. See Rule 25.

Also, in the Federal Draft, subdivision (f) requires reproduction of statutes, rules, regulations, etc. This has been changed, so that reproduction is permissive, unless ordered by the supreme court.

Rule 24. Brief of an amicus curiae.

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 29 of the

Federal Draft. It follows the practice of a majority of federal circuits in requiring leave of court to file an amicus brief unless the litigants consent to its filing.

Rule 25. The appendix to the briefs.

(a) **USE OF AN APPENDIX.** At any time before final decision, the supreme court may order an appendix to any brief. Also, either the

appellant or respondent may, if he deems it desirable, prepare, file and serve with his brief an appendix.

(b) **CONTENTS OF THE APPENDIX.** Unless otherwise ordered by the supreme court, an appendix shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading and relevant portions of the charge, finding and opinion; (3) the judgment, order or decision in question; and (4) such other parts of the record as any party deems it essential for the judges of the court to read in order to decide the issues presented. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference or examination and shall not engage in unnecessary designation.

(c) **ARRANGEMENT OF THE APPENDIX.** At the beginning of the appendix there shall appear a chronological list of the parts of the record which it contains. Each part of the record shall be listed by the descriptive title given to that part by the reference made to it in the briefs. The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix of the parts of the record referred to in the briefs and contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of contents. Thereafter, the parts of the record shall be set out in chronological order. The original paging of each part of the record set out in the appendix shall be indicated by placing in brackets the number of the original page at the place where that page begins. Omissions in the text of papers or of testimony must be indicated by asterisks. A question and its answer may be contained in a single paragraph.

(d) **REPRODUCTION OF EXHIBITS.** Exhibits may be contained in a separate volume, suitably indexed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

Rules 30 and 31 of the Federal Draft, require post-brief appendices, unless dispensed with by court rule or order. The

rule does not follow the Federal Draft at this point. Rather, under this rule the supreme court may order an appendix, or either party may if he chooses use an appendix. When an appendix is used it is to be filed and served with the brief.

Rule 26. Filing and service of briefs.

(a) **TIME FOR FILING BRIEFS.** The appellant shall serve and file his brief within 30 days after the date on which the record is filed. The respondent shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least 3 days before argument.

(b) **NUMBER OF COPIES TO BE FILED AND SERVED.** Ten copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one copy of each brief shall be served on counsel for each party separately represented. The clerk will

not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by Rule 20.

(c) CONSEQUENCES OF FAILURE TO FILE BRIEFS. If an appellant fails to file his brief within the time provided by this rule, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 31 of the Federal Draft.

Subdivision (a) follows the time fixed for filing of briefs provided in the Federal Draft, and that is the time now allowed by a majority of the federal circuits.

Subdivision (b) of the Federal Draft is omitted, since it provides a post-brief time for filing the appendix. Under Rule

25 an appendix must be filed and served with the brief, unless otherwise ordered by the supreme court.

Subdivision (b) of this rule is patterned after subdivision (c) of the Federal Draft. The number of copies to be filed and served, however, are adjusted to fit state practice and the present requirement of Montana Supreme Court Rule II.

Subdivision (c) of this rule follows subdivision (d) of Rule 31 of the Federal Draft.

Rule 27. Form of briefs, the appendix, motions and other papers.

(a) FORM OF BRIEFS, APPENDICES AND SEPARATE VOLUMES OF EXHIBITS. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be ten inches long and seven inches wide, with a margin on the outer edge not less than one inch wide and on the inner edge not less than two inches wide. If produced by a duplicating or copying process, the pages shall be eleven inches long and eight and one-half inches wide, with a margin on the outer edge not less than one inch wide and on the inner edge not less than two inches wide. The pages shall be fastened at the side and numbered at the top.

(b) TYPEWRITTEN PAPERS AND MOTIONS. Papers not required to be produced in a manner prescribed by subdivision (a) of this rule shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one side only of white typewriter paper, eight and one-half inches wide and thirteen inches long, numbered at the bottom, with a ruled margin of one and one-half inches on the left-hand side of the page and one inch on the right-hand side, and numbered lines, not more than thirty-two lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than two hundred fifty pages; provided, however, that if the pages number fifty or less they may be bound at the top.

In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform typewritten copies has become so great that this rule will be strictly applied and papers not complying with it will not be received.

(c) **FIRST PAGE AND COVER.** All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subdivision (b) of this rule, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of this court, the title of the case as in the court below, adding to the words "Plaintiff" and "Defendant," the words "Appellant" and "Respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

Rule 32 of the Federal Draft is adjusted to conform to the paper and forms

prescribed for state practice and Montana Supreme Court Rule II, as amended effective January 1, 1965. The provisions requiring the use of pica type and two typewritten originals are stricken as being obsolete or unnecessary.

Rule 28. Prehearing conference.

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceedings by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issue to those not disposed of by admission or agreements of counsel, and such order when entered controls the subsequent course of the proceedings, unless modified to prevent manifest injustice.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 33 of the Federal Draft.

Rule 29. Oral argument.

(a) **NOTICE OF HEARING—POSTPONEMENT.** The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the hearing must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) **TIME ALLOWED FOR ARGUMENT.** Upon oral argument of an appeal or original proceeding, 40 minutes will be allowed appellant or applicant and 30 minutes to respondent. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed reasonably in advance of the date fixed for hearing. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) ORDER AND CONTENT OF ARGUMENT. The appellant or applicant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case, and the closing argument shall be limited to rebuttal of respondent's argument. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) CROSS AND SEPARATE APPEALS. A cross or separate appeal shall be argued with the initial appeal at a single hearing, unless the court otherwise directs. If a case involves a cross appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument at the hearing.

(e) NONAPPEARANCE OF COUNSEL—FAILURE TO FILE BRIEFS. If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

(f) SUBMISSION ON BRIEFS. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) USE OF PHYSICAL EXHIBITS AT HEARING—REMOVAL. If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 34 of the Federal Draft, but the time provisions are more liberal than those of the Federal Draft which allows 30 minutes to each side. It is intended that the time be afforded to opposing interests rather than to individual parties, as is true under the

Federal Draft. Thus, if there are multiple appellants they have together but 40 minutes, and multiple respondents have a total of 30 minutes. The 40 minutes for the appellant or applicant may be divided between the opening and closing statement, as the appellant or applicant chooses.

In other particulars this rule follows the usual practice among the federal circuits.

Rule 30. Entry and notice of orders and judgments.

(a) ENTRY AND NOTICE. The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 36 of the Federal Draft. The purpose is to clarify what constitutes an entry of a

judgment or order. The provision for mailing by the clerk is for the convenience of the parties but does not affect the time for taking an appeal, which is controlled by Rule 5. As to the entry of judgments, see M. R. Civ. P., Rule 58.

Rule 31. Interest on judgments.

If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was rendered or made in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

The language of Rule 37 of the Federal Draft is modified to conform to R. C. M. 1947, section 93-8622.

Rule 32. Damages for appeal without merit.

If the supreme court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

appeal. Larry Larson & Associates v. John R. Daily, Inc., 158 M 231, 490 P 2d 355.

Advisory Committee's Note

The language of Montana Supreme Court Rule XIX is substituted for that of Rule 38 of the Federal Draft.

Damages Not Allowed

Appellee was not entitled to recover additional damages under this rule where appellant had a reasonable ground for

Frivolous Appeals

Strangers to action who filed various documents which were stricken as frivolous, then appealed from such striking, were assessed \$1000 damages under this rule. Farmers State Bank of Conrad v. Iverson, — M —, 509 P 2d 839.

Rule 33. Costs.

(a) **COSTS ON APPEAL.** Costs on appeal will be taxed as provided by R. C. M. 1947, section 93-8606, and if not otherwise provided by the Court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 93-8621, R. C. M. 1947.

(b) **COSTS OF BRIEFS AND APPENDICES.** The cost of printing or otherwise producing briefs and appendices shall be taxable at rates not higher than specified in Rule 23(g).

(c) **OTHER COSTS TAXABLE.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) **COSTS IN ORIGINAL PROCEEDINGS.** Costs in original proceedings, including reviews other than by appeal, will be taxed as provided by R. C. M. 1947, sections 93-8602, 93-8603, 93-8604 and 93-8611, and if not otherwise provided by the court in its decision, will be awarded to the successful party against the other party; provided, however, that

costs awarded to plaintiff or relator in special proceedings to review inferior court rulings, orders or judgments will ordinarily be assessed against the real party in interest, namely, the party interested in upholding the inferior court's action, rather than against the state, county, municipality, subdivision, judge or justice.

(e) **UNNECESSARY COSTS.** Whenever it appears that the successful party has caused any redundant, useless or unnecessary matter to be incorporated in the record, briefs, or appendices, whether on appeal or in a special proceeding, he shall not recover as part of his costs so much of the expense as is occasioned thereby.

(f) **NOTATION BY CLERK.** The clerk of the supreme court shall, in all cases, include in the order of judgment of affirmance, reversal or modification on appeal, or for the issuance of a peremptory writ in an original proceeding, and in the remittitur, peremptory writ or judgment, a clause awarding the costs in accordance with this rule or the special order of this Court, to be recovered after claim and ascertainment or taxation thereof in the manner prescribed by law; and the clerk shall also furnish therewith an itemized statement of such costs as have been paid by him.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

Amendments

The amendment of September 10, 1968, in subdivision (a), added the last sentence; in subdivision (b), deleted "in the supreme court" after "taxable" and deleted a second sentence reading "A party who desires such costs to be taxed shall state them in a verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after entry of judgment"; in subdivision (c), substituted the present caption for "costs taxable in the District Court[s]"; in subdivision (f), inserted "the" before "costs in accordance", deleted "in the supreme court" before "in

accordance" and substituted "by" for "to" before "him."

Advisory Committee's Note

This rule is a combination of Rule 39 of the Federal Draft and Montana Supreme Court Rule XVIII. With some adjustment of language, subdivision (a) is taken from the Montana Rule; subdivisions (b) and (c) from the Federal Draft; and subdivisions (d), (e) and (f) from the Montana Rule.

Advisory Committee's Note to September 10, 1968 Amendment

The amendments to Rule 33(a), (b), (c) and (f) are to make it clear that all costs on appeal are claimed in the court below after remittitur and eliminate the former duplication of cost bills in both the supreme court and district court.

Rule 34. Petitions for rehearing.

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision

to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Amendments

The amendment of September 29, 1967 substituted "fact" for "facts" following the colon; deleted a former, next to last sentence reading "No reply to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will not ordinarily be granted in the absence of such a request"; and substituted "and six copies of objections * * * form" for "produced in accordance with Rule 27(a)."

Advisory Committee's Note

This rule is patterned in part after Rule 40 of the Federal Draft. However, the first sentence is added from Montana Supreme Court Rule XV, as is the statement of the grounds for the petition and the procedure for serving and filing objections; also the 14 days for filing pro-

vided in the Federal Draft has been shortened to conform to state practice, and the number of copies required has been reduced from 25 to 6. The second sentence provides for filing of the petition within 10 days after "the decision of the supreme court has been rendered," rather than after "entry of judgment" as provided by the Federal Draft. The purpose is to avoid uncertainty as to when a judgment has been entered, which might exist under the language of the Federal Draft where the mandate of the supreme court is returned to the district court and there entered.

Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

This amendment would dispense with requests by the court as a condition to filing replies to petitions for rehearing, and would permit petitions and objections thereto to be typewritten in the form prescribed by Rule 27(b).

Rule 35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.

(a) NOTICE AND COPY OF DECISION TO BE FURNISHED. Upon the decision of a cause, notice thereof, together with a copy of the court's written decision, will immediately be mailed to counsel for each party.

(b) REMITTITUR — WHEN ISSUED — WHEN COPY OF OPINION TO ACCOMPANY. Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon the denial thereof, unless a modification of the decision is made which permits a further petition for rehearing. A copy of the opinion must accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order terminating the proceedings in the trial court.

(c) MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON. Upon receipt by the clerk of the supreme court of Montana of a mandate from the supreme court of the United States in any case at law or in equity theretofore taken from the supreme court of Montana to the supreme court of the United States, it shall be the duty of said clerk forthwith to issue under his hand and the seal of the supreme court of Montana a remittitur to the district court by which the judgment was rendered, commanding such court to take such action

in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in haec verba of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates Montana Supreme Court Rules XIV, XXI, and XXII.

Rule 36. Voluntary dismissal.

If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, and shall give to each party a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as to costs as may be agreed upon by the parties or fixed by the court. If an appeal has not been docketed the appeal may be dismissed by the court from which the appeal was taken upon the filing in that court of a stipulation for dismissal signed by all parties, or upon motion and notice by the appellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 42 of the Federal Draft.

Rule 37. Substitution of parties.

(a) **DEATH OF A PARTY.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the supreme court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the supreme court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 20. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the supreme court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision.

(b) **SUBSTITUTION FOR OTHER CAUSES.** If substitution of a party in the supreme court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) PUBLIC OFFICERS—DEATH OR SEPARATION FROM OFFICE.

(1) When a public officer is a party to an appeal or other proceeding in the supreme court in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding he may be described as a party by his official title rather than by name; but the court may require his name to be added.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is taken from Rule 43 of the Federal Draft.

Rule 38. Cases involving constitutional questions where the state is not a party.

It shall be the duty of counsel who challenges the constitutionality of any act of the Montana legislature in any suit or proceeding in the supreme court to which the state of Montana, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to the court of the existence of said question, specifying the section of the Code or the chapter of the session law to be construed. The clerk shall thereupon certify such fact to the attorney general of the state of Montana.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule is patterned after Rule 44 of the Federal Draft.

Rule 39. Calendar—Withdrawal of records.

(a) PLACING CAUSES UPON CALENDAR. Thirty days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument.

(b) SETTING CAUSES FOR ARGUMENT. As often as found convenient, causes on the calendar will be set for argument by the court in the chronological order in which they have been placed on the calendar, except such causes as are determined entitled to precedence or as otherwise ordered by the court. Oral arguments will not be heard during the months of July and August.

(c) ADVANCEMENT OF CAUSES. Appeals from orders dissolving, refusing to dissolve, granting or refusing to grant writs of injunction, appeals from orders dissolving or refusing to dissolve attachments, appeals from orders appointing or refusing to appoint receivers, appeals from orders or judgments holding appellant in custody, and workmen's compensation appeals, are entitled to precedence and will, upon motion of either party, be advanced on the calendar.

(d) **PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.** The records and other papers of the supreme court shall not be taken therefrom except by counsel pursuant to a written order of a justice of the court, which order shall specify the time the same may be retained out of the clerk's office; provided, that the court or a justice thereof may require the same to be returned within a shorter period upon notice. The clerk shall preserve each order and counsel's receipt until the papers therein mentioned shall be returned.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

Montana Supreme Court Rules XIII and XVI have been substituted for the provisions of Rule 45 of the Federal Draft.

Rule 40. Appeals from injunction orders.

Upon appeal from an order dissolving or refusing an injunction, if the appellant desires to continue in force the injunction order dissolved by the district court, or to obtain such injunction order pending the appeal, he shall apply to the district court under Rule 62 of the Montana Rules of Civil Procedure. In the event the relief there requested be not granted he may file in the supreme court his sworn application, setting forth the proceedings appealed from and the relief desired, and present with it to the supreme court, a verified copy of the affidavits or evidence used on the hearing in the district court. Such application will be heard ex parte and without argument, and the court, upon such record will make such order in the premises as may be proper.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates the substance of Supreme Court Rule XXIII, as amended effective April 3, 1963.

Rule 41. Statutes and rules amended.

[This rule amended Rule 72 of the Montana Rules of Civil Procedure, and R. C. M. 1947, sections 93-5708, 93-8001, 93-8002, 93-8013 and 93-9905, subdivision 3. For text of amendments see the designated sections.]

Rule 42. Applicability in general.

(a) **SPECIAL STATUTORY PROCEEDINGS.** The statutory proceedings listed in Table A of the Montana Rules of Civil Procedure and any other special statutory proceedings, whether or not listed in said Table A, are excepted from these rules in so far as they are inconsistent or in conflict with the procedure and practice provided by these rules.

(b) **APPEALS TO DISTRICT COURTS.** These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, which shall govern procedure and practice relating thereto in so far as they are not inconsistent with these rules.

(c) **RULES INCORPORATED INTO STATUTES.** Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, pro-

vides that any act in a civil proceeding in a district court or in the Montana supreme court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, in so far as practicable.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This Rule is patterned after Rule 81 of the Montana Rules of Civil Procedure. It excepts inconsistent special statutory proceedings and appeals to and reviews by the district courts to the extent that

they are governed by inconsistent statutes and it is impracticable to incorporate procedures provided by these rules. But statutes such as sections 93-9302, 93-9303, 93-9718, 93-9719, and 93-9922, which contain catch-all references to the applicability of statutes which have been superseded, are brought into line with these rules in so far as practicable.

Rule 43. Title—Effective date—Statutes superseded.

(a) **TITLE.** These Rules shall be known as the Montana Rules of Appellate Civil Procedure and may be cited as M. R. App. Civ. P.

(b) **EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.** These rules will take effect on January 1, 1966. They govern all appeals and original proceedings brought after they take effect, and also all further proceedings in appeals and original proceedings then pending, except to the extent that in the opinion of the supreme court their application in a particular appeal or original proceeding pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the appeal or original proceeding was brought applies.

(c) **STATUTES AND RULES SUPERSEDED.** Upon the taking effect of these rules all statutes and rules, and parts thereof, in conflict herewith, and the statutes and rules listed in Tables A, B, and C, in so far as they relate to civil proceedings, are superseded in respect of practice and procedure on appeals from the district courts to the supreme court and in original proceedings brought in the supreme court.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Advisory Committee's Note

This rule incorporates provisions similar to those contained in Rules 85 and 86

of the Montana Rules of Civil Procedure. Subdivision (c) refers to statutes and rules only in so far as they relate to civil proceedings, to make it clear that criminal proceedings are in no way affected by these rules.

Appendix of Forms.

Form 1.

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE STATE OF MONTANA FROM A JUDGMENT
OR ORDER OF A DISTRICT COURT
IN THE DISTRICT COURT OF THE JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF

A. B.		Plaintiff	} Notice of Appeal
	vs.		
C. D.		Defendant	

Notice is hereby given that C. D., defendant above-named, hereby appeals to the supreme court of the state of Montana (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____, 19_____.

(S) _____

 Attorney for C. D.
 (Address)

Form 2.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO
 APPEAL IN FORMA PAUPERIS
 IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT
 OF THE STATE OF MONTANA,
 IN AND FOR THE COUNTY OF _____

A. B.	vs.	Plaintiff	} AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED ON APPEAL WITHOUT PRE- PAYMENT OF COSTS
C. D.		Defendant	

I, _____, being first duly sworn, depose and say that I am the _____ in the above-entitled case; that in support of my application to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
 - a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
 - b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
 - a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or savings account?
 - a. If the answer is yes, state the total value of the items owned.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Subscribed and Sworn to before
me this day of,
19

Notary Public

Let the applicant proceed without
prepayment of costs.

District Judge

Table A. List of Statutes and Rules Superseded or Amended.

Statutes Superseded (R. C. M. 1947, sections)	R.S.C.M.* Superseded, except as applicable to criminal procedure	M.R.Civ. P.** Rule
93-5501		Superseded
93-5503		62(a)
93-5504	Rule	62(d)
93-5505	I	Amended
93-5506	II	72
93-5507	III (1st par.)	
93-5508	IV	
93-5509	VI	
93-5607	VII	
93-5608	VIII	
93-5702	IX	
93-5707	X	
93-8003	XI	
93-8004	XII	
93-8005	XIII	
93-8006	XIV	
93-8011	XV	
93-8012	XVI	
93-8014	XVII	
93-8015	XVIII	
93-8016	XIX	
93-8017	XXI	
93-8018	XXII	
93-8019	XXIII	
93-8020	XXIV	
93-8021		
93-8022		

Table B

RULES OF APPELLATE CIVIL PROCEDURE

93-8023
 93-8024
 93-8025
 Amended
 93-5708
 93-8001
 93-8002
 93-8013
 93-9905(3)

* Rules of the Supreme Court of Montana.

** Montana Rules of Civil Procedure.

Table B. List of Rules of Appellate Civil Procedure Superseding, in Whole or in Part, or Amending, Statutes and Rules.

	Statutes and Rules** Superseded or Amended (R. C. M. 1947, sections)
M. R. App. Civ. P.*	
Rule	
1	93-8001, 93-8002, 93-8003, 93-8017
2	93-8022
3	93-8019, R. S. C. M. XXIV
4	93-8005, 93-8019
5	93-8004
6	93-8005, 93-8006, 93-8012, 93-8015, 93-8019
7	93-5607, 93-8011, 93-8012, 93-8014, M. R. Civ. P. 62(a), 62(d)
8	93-8013
9, 10, and 25	93-5504 to 93-5509, incl., 93-5608, 93-5707, 93-8018, 93-8019, 93-8021 R. S. C. M. VII, VIII, IX, XVIII subd. 3
11	93-8019, R. S. C. M. VI
12	93-8020
13	93-8016
14	93-8023
15	93-8024
16	93-8025
17	R. S. C. M. IV
19	R. S. C. M. I
20	R. S. C. M. III (1st par.)
22	R. S. C. M. XI
23	R. S. C. M. X
26	R. S. C. M. II subd. 4, III (1st par.)
27	R. S. C. M. II
29	93-5702, R. S. C. M. XII
32	R. S. C. M. XIX
33	R. S. C. M. XVIII
34	R. S. C. M. XV

35	R. S. C. M. XIV, XXI, XXII
37	R. S. C. M. XVII
39	R. S. C. M. XIII, XVI
40	R. S. C. M. XXIII
41	M. R. Civ. P. 72, 93-5708, 93-9905 (3), 93-8001, 93-8002, 93-8013

* Montana Rules of Appellate Civil Procedure are abbreviated "M. R. App. Civ. P."

** Rules of the Supreme Court of Montana are abbreviated "R. S. C. M." Montana Rules of Civil Procedure are abbreviated "M. R. Civ. P."

Table C. List of Statutes and Rules Superseded, in Whole or in Part, or Amended, by Designated Rules of Appellate Civil Procedure.

Statutes (R. C. M. 1947, sections)	M. R. App. Civ. P. Rule
93-5504 to 93-5509, incl.	9, 10, 25
93-5607	7
93-5608	9, 10, 25
93-5702	29
93-5707	9, 10, 25
93-5708	41
93-8001	1, 41
93-8002	1, 41
93-8003	1
93-8004	5
93-8005	4, 6
93-8006	6
93-8011	7
93-8012	6, 7
93-8013	8, 41
93-8014	7
93-8015	6
93-8016	13
93-8017	1
93-8018	9, 10, 25
93-8019	4, 6, 9, 10, 11, 25
93-8020	12
93-8021	9, 10, 25
93-8022	2
93-8023	14
93-8024	15
93-8025	16
93-9905 (3)	41

Rules of the Supreme Court of Montana

I	19
II	26, 27

Table C

RULES OF APPELLATE CIVIL PROCEDURE

III (1st par.)	20, 26
IV	17
VI	11
VII	9, 10, 25
VIII	9, 10, 25
IX	9, 10, 25
X	23
XI	22
XII	29
XIII	39
XIV	35
XV	34
XVI	39
XVII	37
XVIII	9, 10, 25, 33
XIX	32
XXI	35
XXII	35
XXIII	40
XXIV	3

Montana Rules of
Civil Procedure

62(a)	7
62(d)	7
72	41

REVISED CODES OF MONTANA

VOLUME 8 1974 Cumulative Pocket Supplement

Containing

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF
REPLACEMENT VOLUME 8 OF THE
1947 REVISED CODES

AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 8
THROUGH VOLUME 518, PACIFIC REPORTER (2ND SERIES)

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For index see pocket supplement to Replacement Volume 9

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MONTANA REVISED CODES

TITLE 94—CRIMES AND CRIMINAL PROCEDURE

Chapter 513, Laws of 1973, created the Montana Criminal Code of 1973 which completely replaces the original Title 94 of the Revised Codes of Montana as heretofore amended.

All of Title 94, the Montana Criminal Code of 1973, including supplementary materials through the 1974 Second Regular Session of the 43rd Legislative Assembly is published in a separate special supplement issued with the 1974 Pocket Supplements to the Codes.

A Cross Reference Table, appearing in the special pamphlet beginning on page 163, shows, for each section of old Title 94, either the place to which the new section has been transferred by renumbering or the sections, either in new Title 94 or other titles of the Revised Codes, which cover the same subject matter.

Also included in the separate pamphlet edition are Source Notes and Commission Comments on the various sections of the new Criminal Code, and a special Index, beginning on page 195.

TITLE 95—MONTANA CODE OF CRIMINAL PROCEDURE

Chapter.

5. Competency of accused, 95-505 to 95-508.
6. Arrest, 95-611, 95-611.1, 95-611.2, 95-618.
7. Search and seizure, 95-719.
10. Right to counsel, 95-1005.
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CHAPTER 1—SCOPE, PURPOSE, CONSTRUCTION AND RULES

Section

95-103 to 95-108. [Transferred.]

95-103 to 95-108. [Transferred.]

Compiler's Notes

The compiler originally designated these sections as secs. 95-2801 to 95-2806. However, Chapter 513, Laws of 1973, transferred certain other sections from Title 94 to appear as sections 95-2801 to 95-2819. In order to avoid confusion, the compiler has transferred these sections to appear as secs. 95-103 to 95-108. Since there has been no change in text, these sections are not

reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-103	95-2801
95-104	95-2802
95-105	95-2803
95-106	95-2804
95-107	95-2805
95-108	95-2806

CHAPTER 2—DEFINITIONS

95-206. Judge.

Justice of the Peace Courts

Since, by virtue of section 95-2009, a defendant tried in a justice of the peace court is provided with the right to a trial de novo, the word "judge" in section 95-1709 does not include "justice of the

peace" and a justice of the peace may not be disqualified on a simple affidavit for substitution of judge under section 95-1709, rather the provisions of chapter 95-20 must be followed. *Bailey v. State*, — M —, 517 P 2d 708.

95-210. Peace officer.

Cross-References

Certain employees of state highway commission as peace officers, secs. 32-1632 to 32-1641.

Members of Montana university system security department as peace officers, sec. 75-8513.

CHAPTER 5—COMPETENCY OF ACCUSED

Section

- 95-505. Psychiatric examination of defendant with respect to mental disease or defect.
- 95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained.
- 95-507. Determination of irresponsibility on basis of report—access to defendant by psychiatrist of his own choice—form of expert testimony when issue of responsibility is tried.
- 95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge.

95-501. Mental disease or defect excluding responsibility.**M'Naughten and Irresistible Impulse Rules Abandoned**

The M'Naughten and "irresistible impulse" rules no longer apply, having been supplanted by the definition of criminal irresponsibility in subsection (a); the definition in subsection (a) is the same as that adopted by the American Law Institute in Article IV, Section 4.01 of the Model Penal Code except that Montana

legislature substituted "is unable" for "lacks substantial capacity"; by that change the legislature intended to impose a stricter test for mental incapacity than that contemplated by the Model Penal Code. State ex rel. Krutzfeldt v. District Court, Thirteenth Judicial Dist., Yellowstone County, — M —, 515 P 2d 1312.

95-503. Mental disease or defect excluding responsibility, etc.**Burden of Proof**

State was not obliged to present proof

of defendant's sanity in rape prosecution. State v. Olson, 156 M 339, 480 P 2d 822.

95-505. Psychiatric examination of defendant with respect to mental disease or defect. (1) When the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the court shall appoint at least one (1) qualified psychiatrist or shall request the superintendent of Warm Springs state hospital to designate at least one (1) qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty (60) days or such longer period as the court determines to be necessary for the purpose, and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(2) In the examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(3) The report of the examination shall include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis of the mental condition of the defendant;
- (c) If the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense;

(d) When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged; and

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

(4) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

(5) The report of the examination shall be filed (in triplicate) with the clerk of court, who shall deliver copies to the county attorney and to counsel for the defendant.

History: En. 95-505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 88, Ch. 120, L. 1974.

Springs state hospital" in the first sentence of subsection (1) for "Montana state hospital"; and made minor changes in phraseology, punctuation and style.

Amendments

The 1974 amendment substituted "Warm

95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the county attorney nor counsel for the defendant contests the finding of the report filed under section 95-505, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon the hearing, the parties have the right to summon and cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (3) of this section, and the court shall commit him to the custody of the superintendent of Warm Springs state hospital, to be placed in an appropriate institution of the department of institutions for so long as the unfitness endures. When the court, on its own motion or upon the application of the superintendent of Warm Springs state hospital, or the county attorney, or the defendant or his legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant committed to an appropriate institution of the department of institutions.

(3) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair deter-

mination prior to trial and without the personal participation of the defendant.

(4) The expenses of sending the defendant to the custody of the superintendent of the Montana state hospital, to be placed in an appropriate institution of the state department of institutions, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, or the information filed; but the county may recover them from the estate of the defendant, if he has any, or from a town, city or county bound to provide for and maintain him elsewhere.

History: En. 95-506 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 513, L. 1973; amd. Sec. 89, Ch. 120, L. 1974.

Amendments

The 1973 amendment added subsection (4).

The 1974 amendment substituted "Warm

Springs state hospital" for "Montana state hospital" in subsection (2); substituted "department of institutions" for "state department of public institutions" in subsection (2); deleted "public" before "institutions" in subsection (4); and made minor changes in phraseology, punctuation and style.

95-507. Determination of irresponsibility on basis of report—access to defendant by psychiatrist of his own choice—form of expert testimony when issue of responsibility is tried. (1) If the report filed under section 95-505 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested by the attorney prosecuting or the defendant, is satisfied that the mental disease or defect was sufficient to exclude responsibility, the court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

(2) When either the defendant or the state wishes the defendant to be examined by a qualified psychiatrist or other expert, selected by the one proposing the examination, the examiner shall be permitted to have reasonable access to the defendant for the purpose of the examination.

(3) Upon the trial, any psychiatrist who reported under section 95-505 may be called as a witness by the prosecution or by the defense. If the issue is being tried before a jury, the jury shall not be informed that the psychiatrist was designated by the court or by the superintendent of Warm Springs state hospital. Both the prosecution and the defense may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant is competent to testify to an expert opinion with respect to the mental condition or responsibility of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by another witness.

(4) When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he may make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged, and his opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the of-

fense charged. He may make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974.

Amendments

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state hospital" in subsection (3); and made minor changes in phraseology, punctuation and style.

Severance of Trial on Sanity

Denial of defendant's motion for severance for trial of the issues of defendant's guilt or innocence and his sanity was proper since this section and section 95-

508 provide for those matters to be presented at same trial and to same jury. State v. Olson, 156 M 339, 480 P 2d 822.

Trial of Issue of Sanity to both Court and Jury

Defendant who elected to try issue of sanity to trial judge alone was not, after unfavorable finding by court, foreclosed from presenting defense of insanity to the jury. State ex rel. Krutzfeldt v. District Court, Thirteenth Judicial Dist., Yellowstone County, — M —, 515 P 2d 1312.

95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge. (1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him committed to the custody of the superintendent of Warm Springs state hospital to be placed in an appropriate institution for custody, care, and treatment. A person so confined shall have a hearing, unless waived, within fifty (50) days of his confinement to determine his present mental condition and whether he may be discharged or released without danger to others. The court shall cause notice of the hearing to be served upon the person, his counsel and the prosecuting attorney. Such a hearing shall be deemed a civil proceeding and the burden shall be upon the defendant to prove by a preponderance of the evidence that he may be safely released. According to the determination of the court upon the hearing, the defendant shall be discharged or released on such conditions as the court determines to be necessary, or shall be committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care and treatment.

(2) If the superintendent of Warm Springs state hospital believes that a person committed to his custody, under subsection (1) of this section, may be discharged or released on condition without danger to himself or others, he shall make application for the discharge or release of the person in a report to the court by which the person was committed, and shall send a copy of the application and report to the county attorney of the county from which the defendant was committed. The court shall then appoint at least two (2) qualified psychiatrists to examine the person and to report within sixty (60) days, or a longer period which the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate the examinations and the proceedings thereon, the court may have the person confined in any institution located near the place where the court sits, which may hereafter be designated by the superintendent of Warm Springs state hospital as suitable for the temporary detention of irresponsible persons.

(3) If the court is satisfied by the report filed under subsection (2) of this section, and the testimony of the reporting psychiatrists which the court considers necessary that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on conditions which the court determines to be necessary. If the court is not satisfied, it shall promptly order a hearing to determine whether the person may safely be discharged or released. A hearing is considered a civil proceeding and the burden is upon the committed person to prove by a preponderance of the evidence that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall then be discharged or released on conditions which the court determines to be necessary, or shall be recommitted to the custody of the superintendent of Warm Springs state hospital, subject to discharge or release only in accordance with the procedure prescribed above in subsections (2) and (3).

(4) If, within five (5) years after the conditional release of a committed person, the court determines, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of the person or for the safety of others his conditional release should be revoked, the court shall immediately order him to be recommitted to the superintendent of Warm Springs state hospital, subject to discharge or release only in accordance with the procedure prescribed above in subsections (2) and (3).

(5) A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon the application is the same as that prescribed above in the case of an application by the superintendent of Warm Springs state hospital. However, an application by a committed person need not be considered until he has been confined for a period of not less than six (6) months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person shall not be permitted to file a further application until one (1) year has elapsed from the date of any preceding hearing on an application for his release or discharge.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974.

Amendments

The 1973 amendment added the second, third, fourth and fifth sentences to subsection (1); inserted "by a preponderance of the evidence" in the fourth sentence of

subsection (3); and substituted "in subsections (2) and (3)" for "for a first hearing" at the end of subsections (3) and (4).

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state hospital" throughout the section; and made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Burden of Proof

For release of persons committed to state hospital under this section it must be established by evidence convincing beyond a reasonable doubt that release can be effected without danger to the public. *State v. Taylor*, 158 M 323, 491 P 2d 877 (Decision prior to 1973 amendment).

Psychiatrists' Statement

Habeas corpus petition by person committed under this section requires statement by two psychiatrists before it may be considered. *Petition of Brown*, 159 M 550, 497 P 2d 1038 (Decision prior to 1973 amendment).

CHAPTER 6—ARREST

Section

- 95-611. Arrest by a private person.
 95-611.1. Definitions.
 95-611.2. Concealment not proof of theft.
 95-618. Roadblocks.

95-603. Issuance and service of arrest warrant upon complaint.**Examination before Issuing Warrant**

Arrest warrant was invalid and subsequent search and seizure unlawful where complaint of deputy county attorney, under oath, disclosed nothing more than conclusion that defendant sold quantity of marijuana to undercover narcotics

agent, complainant was not examined under oath, and undercover agent could not say that he had purchased from defendant. State ex rel. Wicks v. District Court, 159 M 434, 498 P 2d 1203, distinguished in 507 P 2d 1055, 1056.

95-606. Arrest without a warrant.**Validity of Warrantless Arrest**

A warrantless arrest was valid under section 95-608(d) where detectives smelled burning marijuana emanating from the open doorway to an apartment, where upon entering the apartment police officers saw a clear plastic bag of marijuana and a

burned marijuana stub, where probable cause was supported by information from reliable informants concerning previous drug activity in the apartment, and the building owner had informed the police of possible drug use. State v. Bennett, 158 M 496, 493 P 2d 1077.

95-608. Arrest by a peace officer.**Probable Cause**

Probable cause existed for arrest on dangerous drug charges of three persons who were present and lived in house where drugs were found; but probable cause did not exist concerning fourth party who was present on premises but did not live there, notwithstanding later finding of drugs on such party, since mere presence in place was insufficient to justify arrest. State ex rel. Glantz v. District Court, 154 M 132, 461 P 2d 193.

Reasonable Grounds

Defendant's arrest was based on reasonable grounds required by subsection (d) of this section where an informer had indicated a "pot party" was in progress, defendant was a guest at the party and

a participant therein, and the aroma of burning or burnt marijuana was emanating from the premises, all of which was known to the officers prior to their entry, arrest and search. State v. Hull, 158 M 6, 487 P 2d 1314.

A warrantless arrest was valid under subdivision (d) of this section where detectives smelled burning marijuana emanating from the open doorway to an apartment, saw a clear plastic bag of marijuana and a burned marijuana stub upon entering the apartment, where probable cause was supported by information from reliable informants concerning previous drug activity in the apartment, and the building owner had informed the police of possible drug use. State v. Bennett, 158 M 496, 493 P 2d 1077.

95-611. Arrest by a private person. A private person may arrest another when:

- (1) he believes, on reasonable grounds, that an offense is being committed or attempted in his presence;
- (2) a felony has in fact been committed and he believes, on reasonable grounds, that the person arrested has committed it; or
- (3) he is a merchant, as defined in section 64-212, and has probable cause to believe the other is shoplifting in the merchant's store. Such merchant may stop and temporarily detain the suspected shoplifter; the merchant in such event:

(a) shall promptly inform the person that the stop is for investigation of shoplifting, and that upon completion of the investigation the person will be released or turned over to the custody of a peace officer;

(b) may demand of the person his name and his present or last address and may question the person in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting;

(c) may take into possession any merchandise for which the purchase price has not been paid and which is in the possession of the person or has been concealed from full view; and

(d) may place the person under arrest or request the person to remain on the premises until a peace officer arrives.

Any stop, detention, questioning or recovery of merchandise under this subsection shall be done in a reasonable manner and time. Unless evidence of concealment is obvious and apparent to the merchant this section shall not authorize a search of the detained person other than a search of his coat or other outer garments and any package, brief case or other container unless the search is done by a peace officer under proper legal authority. After the purpose of a stop has been accomplished or thirty (30) minutes have elapsed, whichever occurs first, the merchant shall allow the person to go unless the person is arrested and turned over to the custody of a police officer.

(4) Such stop and temporary detention, with or without questioning or removal of merchandise, when done by a merchant in compliance with the law, shall not constitute an unlawful arrest or search. A merchant stopping, detaining, or arresting a person on the belief that such person is shoplifting, is not liable for damages to such person unless the merchant acts with malice either actual or implied or contrary to the provisions of this law.

History: En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L. 1974.

Amendments

The 1974 amendment added subdivisions (3) and (4) and made minor changes in phraseology, punctuation and style.

95-611.1. Definitions. As used in this act:

(1) "Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment with the intent to deprive the merchant of all or part of the value of the merchandise. The following acts or deceptive conduct shall be prima facie evidence of concealment: concealing merchandise upon the person, or in a container, or otherwise removing such merchandise from full view while upon the premises; or removing, changing, or altering any price tag; or transferring or moving any merchandise upon the premises to obtain a lower price than the merchandise was offered for sale by the merchant; or abandoning or disposing of any merchandise in such a manner that the merchant will be deprived of all or part of the value of the merchandise.

(2) "Shoplifting" means the theft of any goods offered for sale by a wholesale or retail store or other mercantile establishment.

History: En. 95-611.1 by Sec. 1, Ch. 274, L. 1974.

Title of Act

An act defining shoplifting as theft;

amending sections 95-611 and 11-1602, R. C. M. 1947, expanding a citizen's right to detain and arrest offenders and limiting civil actions based on such detentions and arrests.

95-611.2. Concealment not proof of theft. Concealment of merchandise shall not constitute proof of the commission of the offense of theft.

History: En. 95-611.2 by Sec. 2, Ch. 274, L. 1974.

95-618. Roadblocks. (a) * * * [Same as parent volume.]

(b) Authority to Establish Roadblocks. The duly elected or appointed law-enforcement officers of this state, and their deputies, are hereby authorized to establish, in their respective jurisdictions, or in other jurisdictions within the state, temporary roadblocks on the highways of this state for the purpose of identifying drivers, checking for driver's licenses, and apprehending persons wanted for violation of the laws of this state, or of any other state, or of the United States, who are using the highways of this state.

(c) to (e) * * * [Same as parent volume.]

History: En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971.

Amendments

The 1971 amendment inserted "checking for driver's licenses" in subsection (b).

CHAPTER 7—SEARCH AND SEIZURE

Section

95-719. Stop and frisk.

95-701. Searches and seizures—when authorized.

Consent

Where defendant in first-degree murder prosecution had taken sheriff to his house and turned over alleged murder weapon to sheriff, such action did not constitute an illegal search and seizure since defendant voluntarily consented to turning over rifle. *State v. Williams*, 153 M 262, 455 P 2d 634.

Where appellant, convicted on charge of robbery, had been given three Miranda warnings during course of investigation, evidence obtained from appellant's apartment after he gave consent to police to go there was not the product of an unlawful search and seizure and therefore its admission was not error, notwithstanding that no warrant was issued for such search. *State v. Braden*, 154 M 90, 460 P 2d 85.

Lawful Inspection

Sheriff who was called to search for prowler was justified under subsection (d) of this section in seizing items in

plain view during such search. *State v. Gallagher*, — M —, 509 P 2d 852.

Prior Justification

Police officers who, acting upon suspicion that defendant was a runaway juvenile, had taken defendant to the sheriff's office for the purpose of identifying her and contacting her parents, were without sufficient justification for searching defendant's purse for identification where defendant had produced two items of identification and had informed officers that she had a birth certificate at her home which would substantiate the identification; marijuana and hashish found in search of defendant's purse was excluded since there was no valid reason for the officer's presence in defendant's purse and the "plain view" doctrine was not applicable. *State v. Hough*, — M —, 516 P 2d 613.

Search Without Warrant

Police officers who had been given de-

scription of automobile and its occupants who were suspected of having recently robbed a pharmacy had probable cause to believe the vehicle was carrying stolen

property, and evidence obtained in search of automobile without warrant was admissible. *State v. Spielmann*, — M —, 516 P 2d 617.

95-703. Search warrant defined.

Sufficient Description of Premises To Be Searched

Search warrant which described the premises to be searched as "two cabins located near the Duck Creek 'Y', near west Yellowstone, Montana, near the office building at Koelzer's Duck Creek

cabins" was of insufficient particularity where there were three cabins in the area of the office building and where police had good reason to believe that only one of the houses contained controlled substances. *State v. Ballew*, — M —, 516 P 2d 1159.

95-704. Grounds for search warrant.

Description of Place and Property

Warrant which directed law enforcement personnel to search a 1969 blue one-half ton Chevrolet pick up, Montana license 2T-5275 located in Custer County garage in Miles City, County of Custer, State of Montana sufficiently described object of search. *State v. Meidinger*, — M —, 502 P 2d 58.

General Warrant

Search warrants which incorporated phrase "any .22 caliber pistol" and "any other property or evidence they might discover that may connect to the demise" of deceased was not a "general warrant," and therefore was not constitutionally invalid. *State v. Quigg*, 155 M 119, 467 P 2d 692.

"Probable Cause"

There was not probable cause for issuance of search warrant for burglar tools and illegal drugs based on judge's personal knowledge of the accused's reputation and witnesses' observations of a pillow and tools in his car from which accused drew gun. *State v. Bentley*, 156 M 129, 477 P 2d 345.

Affidavit, based on hearsay from reliable and credible informants with no felony convictions, was sufficient basis for a search warrant for dangerous drugs where informants' statements were results of direct personal observations, reliable information as to the present status

of the situation existed, and the police officers made corroborative statements that the suspect was a dangerous drug user and an associate of users of narcotics. *State v. Troglia*, 157 M 22, 482 P 2d 143.

Stolen property in plain sight which is discovered by police during lawful impounding of vehicle may be used as basis of probable cause for issuance of search warrant, even though defendant was not in vehicle at time of arrest but vehicle was later found near scene of arrest. *State ex rel. Wilson v. District Court*, 159 M 439, 498 P 2d 1217.

Application for search warrant was defective under this section, notwithstanding it informed issuing justice of criminal activity in certain room in house, since only connection between defendant and activity described was that he had a room in such house. *State ex rel. Garriss v. Wilson*, — M —, 511 P 2d 15.

Sufficient Description of Premises To Be Searched

Search warrant which described the premises to be searched as "two cabins located near the Duck Creek 'Y', near west Yellowstone, Montana, near the office building at Koelzer's Duck Creek cabins" was of insufficient particularity where there were three cabins in the area of the office building and where police had good reason to believe that only one of the houses contained controlled substances. *State v. Ballew*, — M —, 516 P 2d 1159.

95-705. Scope of search with warrant.

Description of Place and Property

Search warrant directing officers to search for "a walkie-talkie, license plates, and there may be fingerprints, letters, papers, burglary tools, and other objects

or materials which may be the fruit of an offense or evidence of an offense," sufficiently described objects to be seized. *State v. Meidinger*, — M —, 502 P 2d 58.

95-707. By whom served.

General Description of Officer

A search warrant directed to "any peace officer of this state," was a valid war-

rant. *State v. Meidinger*, — M —, 502 P 2d 58.

95-717. When search and seizure not illegal.**Disclaimer**

Evidence discovered during search of house occupied by defendant's mother was properly admitted on charge of burglary since defendant disclaimed any in-

terest in property recovered from search and had no possessory interest in his mother's home. *State v. Dess*, 154 M 231, 462 P 2d 186.

95-719. Stop and frisk. (1) A peace officer may stop any person he observes in circumstances that give the peace officer reasonable cause to suspect that the person has committed, is committing, or is about to commit an offense involving the use or attempted use of force against the person or theft, damage or destruction of property if the stop is reasonably necessary to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person.

(2) A peace officer may stop any person he finds near the scene of an offense that the peace officer has reasonable cause to suspect has just been committed if:

(a) the peace officer has reasonable cause to suspect that the person has knowledge of material aid to the investigation of the offense; or

(b) the stop is reasonably necessary to obtain or verify the person's identity or an account of the offense.

(3) A peace officer may stop any person in connection with an offense that the peace officer has probable cause to believe has been committed if:

(a) the offense is a felony involving the use or the attempted use of force against a person or theft, damage, or destruction of property; and

(b) the peace officer has reasonable cause to suspect the person committed the felony; and

(c) the stop is reasonably necessary to obtain or verify his identity to determine whether to arrest the person for the felony; or the peace officer has reasonable cause to suspect that the person was present at the scene of the offense, and the stop is reasonably necessary to obtain or verify the person's identity.

(4) A peace officer who has lawfully stopped a person under this section may:

(a) frisk that person and take other reasonably necessary steps for protection if the peace officer has reasonable cause to suspect that the person is armed and presently dangerous to the peace officer or another person present; and

(b) take possession of any object that the peace officer discovers during the course of the frisk if the peace officer has probable cause to believe the object is a deadly weapon.

(5) A peace officer who has lawfully stopped a person under this section may demand of the person his name and his present or last address.

(6) A peace officer who has lawfully stopped a person under this section shall inform the person, as promptly as possible under the circumstances and in any case before questioning the person, that he is a peace officer and that the stop is not an arrest but rather a temporary detention

for an investigation, and that upon completion of the investigation the person will be released unless he is arrested.

(7) After the authorized purpose of the stop has been accomplished or thirty (30) minutes have elapsed, whichever occurs first, the peace officer shall allow the person to go unless he has arrested the person.

History: En. 95-719 by Sec. 4, Ch. 513,
L. 1973.

CHAPTER 8—THE OFFICE OF THE CORONER

95-802. Coroner to have autopsy—when.

Compiler's Notes

Section 104, Ch. 349, Laws 1974, substituted "department of health and environ-

mental sciences" in this section for "Montana state board of health."

CHAPTER 10—RIGHT TO COUNSEL

Section

95-1005. Remuneration of appointed counsel.

95-1001. Right to counsel.

Attorney's Lien

Court could not summarily impose a lien on defendant's estate in favor of county for services of counsel appointed when it was thought defendant might be indigent. *Petition of Hunsinger*, 153 M 445, 456 P 2d 304.

Effect of Discharge of Counsel

There was no ground for appeal based on inadequate representation where defendant attempted to discharge his appointed counsel one day before trial after counsel had adequately represented defendant for months. *State v. Forsness*, 159 M 105, 495 P 2d 176.

95-1002. Waiver of counsel.

Waiver of Right to Counsel

Even though appellant was not eighteen years old, but rather seventeen years and eight months old, this section did not apply where defendant had been convicted of robbery, had I.Q. of 122, had

been in trouble with law before, had spent time in state correctional school, had been given three Miranda warnings and had waived his right to counsel. *State v. Braden*, 154 M 90, 460 P 2d 85.

95-1005. Remuneration of appointed counsel. Whenever, in a criminal action or proceeding, an attorney at law represents or defends any person by order of the court, on the ground that the person is financially unable to employ counsel, such attorney shall be paid for his services such sum as a district court or justice of the state supreme court certifies to be a reasonable compensation therefor and shall be reimbursed for reasonable costs incurred in the criminal proceeding. Such costs shall be chargeable to the county in which the proceeding arose, except that (a) in proceedings solely involving the violation of a city ordinance or state statute prosecuted in a municipal, city or police court wherein costs shall be chargeable to the city or town in which the proceeding arose, and (b) in arrests in criminal proceedings by agents of the department of fish and game and arrests by agents of the department of justice, the costs (including attorneys' fees of attorneys appointed by the court for the defendant) must be borne by the state agency causing the arrest.

History: En. 95-1005 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 186, L. 1973; amd. Sec. 1, Ch. 15, L. 1974.

Amendments

The 1973 amendment added the excep-

tion at the end of the second sentence.

The 1974 amendment divided the second sentence into (a) and (b); added the language in subdivision (b); and made minor changes in style and phraseology.

CHAPTER 11—BAIL

95-1108. Bailable offenses.

Presumption of Guilt

Trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was remanded for new trial where defendant offered evidence of good conduct while in prison, was released on bail for a period of two weeks after the verdict but appeared for sentencing, made proof as to an

amount of bail and its availability, and was not a security risk; presumption of guilt sufficient to deny bail was not established by previous trial transcript where appellate court's opinion did not discuss five issues, one of which was the sufficiency of the evidence. *State v. Campbell*, — M —, 500 P 2d 801.

95-1109. Bail after conviction.

Abuse of Discretion

Where complete presentence investigation was conducted, trial court did not abuse its discretion by refusing admission to bail pending appeal after defendant was convicted of second-degree murder and sentenced to fifty years in state prison. *State v. Kotarski*, 154 M 309, 462 P 2d 873.

Denial of bail pending determination of appeal subsequent to conviction of second degree murder was not an abuse of the discretion where based on concern for safety of other citizens living in the area. *French v. Crist*, — M —, 518 P 2d 35.

95-1119. Bail on a new trial.

Reversal of Conviction

Trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was remanded for a new trial where defendant offered evidence of good conduct while in prison, was released on bail for a period of two weeks after the verdict but appeared for sentencing, made proof as to an amount of

bail and its availability, and was not a security risk; presumption of guilt sufficient to deny bail was not established by previous trial transcript where appellate court's opinion did not discuss five issues, one of which was the sufficiency of the evidence. *State v. Campbell*, — M —, 500 P 2d 801.

CHAPTER 12—PRELIMINARY EXAMINATION

95-1202. Proceedings at the preliminary examination.

Option To Use Information

Order by justice of peace setting a time and place for preliminary hearing does not prevent prosecution from proceeding instead by information filed under section 95-1301. *State v. Dunn*, 155 M 319, 472 P 2d 288.

Right to Preliminary Hearing

Where supporting affidavit filed under section 95-1301(a) established probable cause to the satisfaction of the district judge, defendant had no right to a preliminary hearing to conduct a "fishing expedition" for pretrial discovery of prosecution's evidence. *State v. Dunn*, 155 M 319, 472 P 2d 288.

DECISIONS UNDER FORMER LAW

Right to Preliminary Hearing

Since in 1960 defendant had no right to preliminary hearing, issue of waiver of such right was irrelevant, as state could

have proceeded against him even had he prevailed at such hearing. *Pine v. Estelle*, 470 F 2d 721.

CHAPTER 13—LEAVE TO FILE INFORMATION AND TIME FOR FILING INFORMATION

95-1301. Leave to file information.

Bypassing Preliminary Hearing

Where preliminary hearing was ordered for defendant after an initial appearance before justice of the peace, prosecutor was not precluded thereby from subsequently filing for leave to file an information under this section. *State v. Dunn*, 155 M 319, 472 P 2d 288.

Granting Leave

Where relators were arrested and charged with possession of dangerous drugs, district court did not err in granting leave to file informations against such persons, pursuant to this section, since probable cause existed for arrest of these persons without warrant. *State ex rel. Glantz v. District Court*, 154 M 132, 461 P 2d 193.

Probable Cause

Arrest of defendant in presence of co-defendant at site of one burglary and subsequent discovery in codefendant's automobile of property stolen in another burglary earlier in same evening did not establish probable cause for information against defendant for earlier burglary. *State ex rel. Wilson v. District Court*, 159 M 439, 498 P 2d 1217.

Sufficiency of Facts Alleged

Where evidence in supporting affidavit established probable cause to satisfaction of district judge, defendant had no right to preliminary hearing to enable him to discover information and knowledge of state's witnesses. *State v. Dunn*, 155 M 319, 472 P 2d 288.

An affidavit is sufficient to establish jurisdiction of the district court if it specifies that the offense was committed within the county even though the county contains an Indian reservation and the affidavit has not negated the possibility that the offense was committed within the reservation. *State ex rel. Bell v. District Court*, 157 M 35, 482 P 2d 557.

An affidavit which does not give specific time and place is insufficient to show probable cause even though it alleges that the defendant committed the offense of rape by intercourse with a female child under eighteen, not his spouse, within the county. *State ex rel. Bell v. District Court*, 157 M 35, 482 P 2d 557.

Supporting Affidavit

There is no requirement under subsection (a) that a supporting affidavit of a witness having direct knowledge of facts sufficient to establish probable cause be filed with the application to file an information. *State v. Dunn*, 155 M 319, 472 P 2d 288.

Absence of supporting affidavit for leave to file information contrary to this section was not fatal error, since it is a procedural matter and does not affect substantial rights of the defendant. *State v. Logan*, 156 M 48, 473 P 2d 833.

In its discretion, district court may require evidence other than affidavit for support before it grants permission for direct filing of information with district court. *State ex rel. Bell v. District Court*, 157 M 35, 482 P 2d 557.

CHAPTER 14—GRAND JURY

Section

- 95-1401. Summoning grand juries.
- 95-1402. Objections to grand jury and to grand jurors.
- 95-1410. Finding and presentment of the indictment.

95-1401. Summoning grand juries. A grand jury must only be drawn and summoned when the district judge in his discretion considers a grand jury necessary and shall so order. The grand jury must consist of eleven (11) persons, of whom eight (8) must concur to find an indictment. The district judge may direct the selection of one (1) or more alternate jurors who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. If a member of the jury becomes unable to perform his duty he may be replaced by an alternate. The composition and drawing of a grand jury shall be in accordance with the provisions of sections 93-1801 to 93-1804.

History: En. 95-1401 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 3, L. 1973.

jury from seven to eleven persons; and increased the number of votes required to find an indictment from five to eight.

Amendments

The 1973 amendment increased the grand

95-1402. Objections to grand jury and to grand jurors. (a) * * * [Same as parent volume.]

(b) **Motion to Dismiss.** A motion to dismiss the indictment may be based on the grounds that the grand jury was not selected, drawn or summoned according to law, or that an individual juror was not legally qualified. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to section 95-1403 of this code that eight (8) or more jurors after deducting those not legally qualified, concurred in finding the indictment.

History: En. 95-1402 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 2, Ch. 3, L. 1973.

ber of jurors specified in the latter part of the second sentence of subdivision (b) from five to eight.

Amendments

The 1973 amendment increased the num-

95-1410. Finding and presentment of the indictment. (a) An indictment cannot be found without the concurrence of at least eight (8) grand jurors. When so found it must be endorsed, "a true bill," and the endorsement must be signed by the foreman of the grand jury.

(b) **Indictment. How Presented and Filed:**

(1) and (2). * * * [Same as parent volume.]

(c) If the defendant is in custody or has given bail and eight (8) jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(d). * * * [Same as parent volume.]

History: En. 95-1410 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 3, L. 1973.

ber of grand jurors specified in the first sentence of subdivision (a) and in subdivision (c) from five to eight.

Amendments

The 1973 amendment increased the num-

CHAPTER 15—CHARGING AN OFFENSE

Section

95-1504. Joinder and discharge of offenses and defendants.

95-1507. Sentence of imprisonment for persistent felony offender.

95-1503. Form of charge.

Sufficiency of Charge

Information charging drug offense was insufficient where it contained neither identity of informer nor specific facts concerning the offense and identity of time and place to protect accused from double jeopardy. State ex rel. Offerdahl v. District Court, 156 M 432, 481 P 2d 338.

Sufficiency of Charge—Unlawful Sale of Drug

Information charging defendant with violation of section 54-132 for sale of dangerous drugs was sufficient even though failing to conform with specific requirements of this section, since defendant was apprised of the charges against him. State v. Dunn, 155 M 319, 472 P 2d 288.

95-1504. (11974, 11975) Joinder and discharge of offenses and defendants. (a) to (c). * * * [Same as parent volume.]

(d) When two or more persons are included in the same charge, the court may, at any time, before the defendants have gone into their defense, on the application of the county attorney, direct any defendant to be discharged, that he may be a witness for the state.

(e) When two or more persons are included in the same indictment or information, and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant.

History: Subsections (a) to (c): en. 95-1504 by Sec. 1, Ch. 196, L. 1967.

Subsections (d) and (e): en. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; amd. Secs. 2075, 2076, Pen. C. 1895; re-en. Secs. 9276, 9277, Rev. C. 1907; re-en. Secs. 11974, 11975, R. C. M. 1921; Secs. 94-7206, 94-7207, R. C. M. 1947; redcs, 95-1504 (d) and (e) by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Secs. 1099, 1100.

Compiler's Notes

Subsections (d) and (e) were originally numbered 94-7206 and 94-7207. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this section.

Severance of Issues of Guilt and Sanity

Denial of defendant's motion for severance for trial of issues of defendant's guilt or innocence and his sanity was proper since sections 95-507 and 95-508 provide for those matters to be presented at same trial and to same jury. *State v. Olson*, 156 M 339, 480 P 2d 822.

95-1505. Amending the charge.

DECISIONS UNDER FORMER LAW

Amendment of Information

Allowing prosecution to amend charges in information from first degree burglary to burglary on motion presented on day

of trial was not error since elements of crime and proof required for conviction remained the same. *State v. Stewart*, — M —, 507 P 2d 1050.

95-1506. Prior conviction.

Constitutionality

Subsection (d) of this section does not unconstitutionally deprive accused of right to jury trial. *Newman v. Estelle*, 156 M 502, 484 P 2d 276, certiorari denied 404 US 966, 92 S Ct 341.

in his own behalf. *State v. Romero*, — M —, 505 P 2d 1207.

Notice

Where state, pursuant to this section, gave proper notice to defendant of its intention to seek increased punishment if defendant was convicted on charge of rape, on basis of defendant's prior conviction of felony, there was no error since jury was not in possession of such information. *State v. Metcalf*, 153 M 369, 457 P 2d 453.

Cross-Examination of Defendant

Even though prosecutor gave notice under this section, defendant was not entitled to enjoin prosecutor from cross-examining defendant on prior convictions in the absence of a showing of prejudice from cross-examination, and defendant was not prejudiced by his failure to testify after injunction was denied. *State v. Lewis*, 157 M 452, 486 P 2d 863.

Sufficiency of Evidence

Mere showing that defendant's name is similar to name of person on charge sheet showing alleged prior offense is not sufficient to authorize enhanced sentence; there must be competent proof that defendant is same person as one named on charge sheet; failure to produce such proof does not invalidate conviction, only sentence. *State v. Cooper*, 158 M 102, 489 P 2d 99.

Impeachment

Subsection (b) of this section does not change any law relative to informing the jury of a defendant's prior record for impeachment purposes; a prior record of the defendant may still be used to impeach his testimony should he decide to testify

95-1507. Sentence of imprisonment for persistent felony offender. (1)

A persistent felony offender is an offender who has been previously convicted of a felony and the present offense is a second felony committed on a different occasion than the first.

(2) A persistent felony offender shall be imprisoned in the state prison for a term of not less than five (5) years nor more than one hundred (100) years providing:

(a) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of one (1) year could have been imposed; and

(b) less than five (5) years have elapsed between the commission of the present offense and either,

(i) the previous felony conviction or

(ii) the offenders released on parole or otherwise from a prison or other commitment imposed as a result of the previous felony conviction; and

(c) the offender was more than twenty-one (21) years old at the time of the commission of the new offense.

(3) A previous felony conviction shall not be considered for the purpose of sentencing under this section if the offender has been pardoned on the grounds of innocence, or if the conviction had been set aside in any post-conviction hearing.

History: En. 95-1507 by Sec. 5, Ch. 513, L. 1973.

DECISIONS UNDER FORMER LAW

Harmless Admission

Where defendant's prior conviction of felony was not charged during trial but was admitted by the defendant in his testimony, such admission was not prejudicial since the sentence he finally received was less than he would have received under the second offense statute. *Petition of Gallagher*, 153 M 440, 456 P 2d 306.

Void Conviction

Where prior felony conviction was void because of denial of due process during arraignment, it was improper to sentence a defendant under second offense statute. *Lewis v. State*, 153 M 460, 457 P 2d 765.

CHAPTER 16—ARRAIGNMENT OF DEFENDANT

95-1608. Irregularity of arraignment.**Failure to File Affidavit**

Failure of county attorney to support request for direct information with accompanying affidavit contrary to section 95-

1301 was a procedural matter that did not affect substantial rights of the defendant. *State v. Logan*, 156 M 48, 473 P 2d 833.

CHAPTER 17—PRETRIAL MOTIONS

Section

95-1703. Dismissal on motion of court or application of attorney prosecuting.

95-1711. Effect of former prosecution and multiple prosecutions.

95-1701. Defenses and objections which may be raised before trial.**Entrapment**

Testimony that police informant bought defendant two drinks, inquired if defendant knew where informant could buy narcotics and thereafter followed defendant's lead to a house where informant was able to purchase LSD did not estab-

lish entrapment as a matter of law; casual offer to buy unaccompanied by pleading, begging or coercing of the accused does not constitute entrapment. State ex rel. Hamlin v. District Court, First Judicial Dist., Lewis and Clark County, — M —, 515 P 2d 74.

95-1702. Defenses and objections which must be raised before trial.**Waiver**

Failure to object in trial court that application for permission to file an information was not accompanied by sup-

porting affidavit contrary to section 95-1301 waived the objection. State v. Logan, 156 M 48, 473 P 2d 833.

95-1703. Dismissal on motion of court or application of attorney prosecuting. (1) The court may, either on its own motion or upon the application of the attorney prosecuting, and in furtherance of justice, order an action, complaint, information, or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

(2) The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

If a defendant, after entry of plea upon a complaint, information, or indictment charging a misdemeanor, whose trial has not been postponed upon his application, is not brought to trial within six months.

(3) An order for the dismissal of an action, as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.

History En. 95-1703 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 173, L. 1971.

Amendments

The 1971 amendment designated the former provisions as subsection (1) and added subsections (2) and (3).

95-1708. Motion for continuance.**Absence of Witnesses**

Trial court did not abuse its discretion in denying continuance to allow defendants time to locate two missing witnesses where defendants' counsel had no knowledge of the whereabouts of the missing witnesses and no showing was made that the testimony of the two witnesses would help the defense. State v. DiGiallonardo, — M —, 503 P 2d 43.

Substitution of Counsel

Denial of motion for continuance based on substitution of counsel was not an abuse of discretion or a denial of defendants' constitutional right to counsel where defendants had refused for three months to communicate with court-appointed counsel and first attempted to obtain alternate counsel on the day before trial. State v. Spurlock, — M —, 506 P 2d 842.

95-1709. Substitution of judge.**Justice of the Peace Courts**

Since, by virtue of section 95-2009, a defendant tried in a justice of the peace court is provided with the right to a trial de novo, the word "judge" in section 95-1709 does not include "justice of the

peace" and a justice of the peace may not be disqualified on a simple affidavit for substitution of judge under section 95-1709, rather the provisions of chapter 95-20 must be followed. Bailey v. State, — M —, 517 P 2d 708.

Substitution for Cause

Denial of motion for substitution of judge for cause under subsection (b) was not an abuse of discretion or a denial of due process in view of record and absent a showing of prejudice despite fact that defendant had been tried before same judge previously and that a dispute between the defendant and the judge had occurred at that trial over credit for jail time; subject judge's holding of the hearing on his own prejudice, prior sentencing of the defendant and denial of recess to allow counsel for defendant to commence an original proceeding in su-

preme court were not indications of an abuse of discretion. *State v. Parker*, — M —, 506 P 2d 850.

Timely Motion

Affidavits of disqualification filed only four days before scheduled trial date were properly denied where affiants made no showing that there should be a variance or justification for failure to file the affidavit fifteen days prior to trial as provided by statute. *State ex rel. Paschke v. District Court, Thirteenth Judicial Dist.*, — M —, 514 P 2d 590.

95-1710. Change of place of trial.**Justice of the Peace Courts**

Since, by virtue of section 95-2009, a defendant tried in a justice of the peace court is provided with the right to a trial de novo, the word "judge" in section 95-1709 does not include "justice of the

peace" and a justice of the peace may not be disqualified on a simple affidavit for substitution of judge under section 95-1709, rather the provisions of chapter 95-20 must be followed. *Bailey v. State*, — M —, 517 P 2d 708.

95-1711. Effect of former prosecution and multiple prosecutions. (1)
Definitions of terms.

(a) The term "same transaction" includes conduct consisting of:

(i) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

(ii) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(b) An offense is an "included offense" when:

(i) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(ii) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(iii) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(2) Method of prosecution when conduct constitutes more than one offense. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, and unless the law provides that the specific periods of such conduct constitute separate offenses.

(3) When prosecution barred by former prosecution. Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order of judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

(i) a judgment of conviction which has not been reversed or vacated; or

(ii) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant; or

(iii) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(i) the defendant consents to the termination or waives his right to object to the termination; or

(ii) the trial court, in the exercise of its discretion, finds that the termination is necessary because:

(A) it is physically impossible to proceed with the trial in conformity with law; or

(B) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(C) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(D) the jury is unable to agree upon a verdict; or

(E) false statements of a juror on voir dire prevent a fair trial.

(4) Former prosecution in another jurisdiction—when a bar. When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in subsection (3) and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

(5) Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant. A prosecution is not a bar within the meaning of subsections (3) and (4) under any of the following circumstances:

(a) the former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(b) the former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or

(c) the former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

History: En. 95-1711 by Sec. 6, Ch. 513,
L. 1973.

DECISIONS UNDER FORMER LAW

Same Transaction

Information that did not particularize the charge against defendant was not factually defective, since prosecution for same transaction that resulted in earlier conviction is expressly barred. *State v. Dunn*, 155 M 319, 472 P 2d 288.

Defendant's conviction of driving while intoxicated and operating a motor vehicle with improper brakes did not bar a subsequent prosecution for involuntary manslaughter. *State v. McDonald*, 158 M 307, 491 P 2d 711.

CHAPTER 18—PRODUCTION AND SUPPRESSION OF EVIDENCE

Section

95-1807. Compelling testimony: immunity from prosecution.

95-1808. "Witness" and "state" defined.

95-1809 to 95-1812. [Transferred from Title 94.]

95-1802. Depositions.**Admissibility in Evidence**

In rape case, testimony of witness given at preliminary hearing in defendant's presence, where witness had been cross-examined by defendant's counsel, and where testimony had been recorded and transcribed by court reporter, was expressly admissible in evidence under this section where proper foundation had been laid first by showing that witness could not be located for trial. *State v. Bouldin*, 153 M 276, 456 P 2d 830.

Availability of Witness

Allowing testimony of purchasers in drug case to be presented by deposition

was error where no subpoena had been issued for purchasers and they had appeared in state to testify at another trial six days after conclusion of accused's trial. *State v. LaCario*, — M —, 518 P 2d 982.

Unwillingness of Witness

Affidavit showing that witness had not answered defendant's mailed request to contact attorney to arrange for interview did not sufficiently establish witness's unwillingness to provide information so as to require a court-ordered deposition. *State v. Dunn*, 155 M 319, 472 P 2d 288.

95-1803. Discovery, inspection, and notice.**Constitutionality**

While this section may be unconstitutional as applied, it is constitutional on its face and not repugnant to 4th, 5th, 6th, and 14th Amendments of constitution of United States. *State ex rel. Sikora v. District Court*, 154 M 241, 462 P 2d 897.

Defendant's rights under fifth, sixth and fourteenth amendments of the United States Constitution were not violated by operation of subsection (d) of this section where neither defendant's witness list nor his notice of insanity and self-defense was used to make a prima facie case against him. *Radford v. Stewart*, 320 F Supp 826, 472 F 2d 1161.

Amendment of Witness List

Allowing amendment of witness list to include victim of crime was not an abuse of discretion on the part of trial judge. *State v. Campbell*, — M —, 500 P 2d 801.

Defenses of Insanity and Self-Defense

This section, as it relates to defenses of insanity and self-defense, is to be interpreted as directory only. *State ex rel. Sikora v. District Court*, 154 M 241, 462 P 2d 897.

There was no reversible error in making defendant comply with insanity and self-

defense notice provisions of subd. (d) of this section, where state court had already decided that section required reciprocal duties of prosecution, state operated in good faith at trial, and facts otherwise revealed no prejudice to defendant. *Radford v. Stewart*, 472 F 2d 1161.

Failure To File Notice of Defense

Trial judge might allow psychiatric proof even though motion was untimely but, where defendant's counsel did not comply with court order to submit all motions of defense at time of pleading to information or during six-month delay in going to trial, trial court properly denied defendant's notice of intention to rely on mental disease or defect under subsection (d) of this section as not being timely filed. *State v. Bentley*, 155 M 383, 472 P 2d 864.

Harmless Error

Defendant was not prejudiced by prosecution's citation of section 94-8904, which had been repealed and replaced by this section, in adding witnesses; this section was a continuation of section 94-8904. *State v. Rozzell*, 157 M 443, 486 P 2d 877.

95-1804. Motion to produce confession or admission.**List of Witnesses**

In the absence of surprise, testimony concerning defendant's oral admission of guilt was properly admitted even though

state had not supplied the names of witnesses to the admission. *State v. Dunn*, 155 M 319, 472 P 2d 288.

95-1806. Motion to suppress evidence illegally seized.**Hearing**

"Hearing" contemplated by this section is full judicial hearing with record made; no "hearing" was held where only record was clerk's docket entry, notwithstanding

ing court's later statement that both parties had agreed to proceed without court reporter. *State v. Fetters*, — M —, 510 P 2d 1.

Timeliness of Motion

Where confusion between the parties and the district court over state intention to drop or continue prosecution after defendant's conviction on assault charge caused delay in defendant's filing motion to suppress illegally seized evidence until three days before trial, the motion was neither improper, nor did the fact that

it was untimely constitute a waiver under the circumstances. *State v. Bentley*, 156 M 129, 477 P 2d 345.

Defendant's failure to make timely motion to suppress evidence waived search and seizure issue for appeal, notwithstanding his objection to introduction of evidence seized. *State v. Gallagher*, — M —, 509 P 2d 852.

95-1807. Compelling testimony: immunity from prosecution. Before or during trial in any judicial proceeding a justice of the supreme court or judge of the district court, upon request by the attorney prosecuting or counsel for the defense, may require a person to answer any question or produce any evidence that may incriminate him. If a person is required to give testimony or produce evidence, in accordance with this section, in any investigation or proceeding he cannot be prosecuted or subjected to any penalty or forfeiture, other than a prosecution or action for perjury or contempt, for or on account of any transaction, matter or thing concerning which he testified or produced evidence.

History: En. 95-1807 by Sec. 7, Ch. 513, L. 1973.

95-1808. "Witness" and "state" defined. "Witness" as used in 95-1809 through 95-1811, R. C. M. 1947, shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word "state" shall include any territory of the United States and District of Columbia.

History: En. 95-1808 by Sec. 8, Ch. 513, L. 1973.

95-1809 to 95-1812. [Transferred from Title 94.]**Compiler's Notes**

These sections were originally numbered 94-9002 to 94-9004 and 94-701-1. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not reprinted here but may be found in bound Volume Eight as follows:

New Sec.**Vol. 8**

95-1809	94-9002
95-1810	94-9003
95-1811	94-9004
95-1812	94-701-1

CHAPTER 19—TRIAL IN DISTRICT COURT**Section**

95-1901.	Method of trial.
95-1909.	Trial jurors.
95-1915.	Verdict.

95-1901. Method of trial. (a). * * * [Same as parent volume.]

(b) Questions of law shall be decided by the court and questions of fact by the jury except on a trial for libel the jury shall determine both questions of law and of fact. Questions of law and fact shall be decided by the court when a trial by jury is waived under subsection (d) of this section.

(c) Defendants in all criminal cases shall have a right to trial by jury not to exceed twelve (12) in number. The parties may agree in writing, at any time before the verdict, with the approval of the court that the jury shall consist of any number less than twelve (12).

(d) Upon written consent of the parties a trial by jury may be waived.

(e) The plea of not guilty puts in issue every material allegation of the indictment, information or complaint.

History: En. 95-1901 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 4, L. 1973.

Amendments

The 1973 amendment added the second sentence to subdivision (b); deleted "However, if no capital offense is involved" at the beginning of the second sentence of subdivision (c); inserted a new subdivision (d); and redesignated former subdivision (d) as subdivision (e); and made a minor change in style.

Instructions

Under subsection (b), trial court was bound to instruct the jury on manslaughter despite fact that the court may have considered the evidence in support of manslaughter weak and inconclusive since the weight to be given the evidence was a question for the jury. *State v. Taylor*, — M —, 515 P 2d 695.

95-1904. Presence of defendant—mistrial for absence.

Conclusive Presumptions

Under this section there is conclusive presumption that defendant was present

at all stages of proceeding unless record affirmatively shows the contrary. *Petition of Eldiwtw*, 153 M 468, 457 P 2d 909.

95-1909. Trial jurors. (a) to (e) * * * [Same as parent volume.]

(f) Each defendant shall be allowed eight (8) peremptory challenges in capital cases, six (6) in all other cases tried in the district court before a twelve (12) person jury, and three (3) in all cases tried in justice of the peace or police courts. However, there may not be additional challenges for separate counts charged in the indictment or information. If the indictment or information charges a capital offense, as well as lesser offenses in separate counts, the maximum number of challenges shall be eight (8). The state shall be allowed the same number of peremptory challenges as all of the defendants. In a civil or criminal case tried in the district court before a six (6) person jury, the state and all the defendants shall be allowed three (3) peremptory challenges each.

(g) to (i) * * * [Same as parent volume.]

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974.

Amendments

The 1974 amendment inserted "before

a twelve (12) person jury" after "the district court" in the first sentence of subsection (f) and added the final sentence in subsection (f).

95-1910. Order of trial.

Admission of Testimony

Where defendant was charged with commission of lewd and lascivious acts upon female under sixteen years of age, admission of testimony from twelve other witnesses concerning other such improper actions before proof of corpus delicti, although possibly technical error under this section, was cured by later permitting

prosecuting witness to take stand. *State v. Jensen*, 153 M 233, 455 P 2d 631.

Instructions—Duty to Object and Point Out Error

Where defendants simply objected to instruction without assigning any grounds, either general or particular, the objection was equivalent to no objection at all, and

the instruction was not reviewable on appeal. *State v. Best*, — M —, 503 P 2d 997.

Opening Statement of Defense

Denial to defendant of opportunity

to make opening statement concerning insanity defense until after presentation of prosecution's case was improper interference with defendant's right to have jury consider his defense. *State v. Olson*, 156 M 339, 480 P 2d 822.

95-1911. When order of trial may be departed from.

Opening Statement of Defense

Denial to defendant of opportunity to make opening statement concerning insanity defense until after presentation of

prosecution's case was improper interference with defendant's right to have jury consider his defense. *State v. Olson*, 156 M 339, 480 P 2d 822.

95-1915. Verdict. (a) Return. The verdict shall be unanimous in all criminal actions. Such verdict shall be signed by the foreman and returned by the jury to the judge in open court.

(b) to (d). * * * [Same as parent volume.]

History: En. 95-1915 by Sec. 1, Ch. 196, L. 1967; Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 2, Ch. 4, L. 1973.

imous in all criminal actions" at the end of the first sentence of subdivision (a) for "unanimous in all felonies and two-thirds (2/3) in all misdemeanors and appeals from justice or police courts."

Amendments

The 1973 amendment substituted "unan-

CHAPTER 20—JUSTICE AND POLICE COURT PROCEEDINGS

Section

95-2006. Verdict.

95-2007. Sentence and judgment.

95-2006. Verdict. (a) Return. The verdict of the jury must in all cases be general. It shall be returned by the jury to the judge in open court, who must enter, or cause it to be entered in the minutes. The verdict of the jury must be unanimous.

(b) Several defendants. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

(c) Poll of jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not a unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(d) Discharge of jury. The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

History: En. 95-2006 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 4, L. 1973; en. 95-2006 by Sec. 30, Ch. 513, L. 1973.

an insignificant variation, is identical to the section as amended by Ch. 4, Laws of 1973.

Compiler's Notes

Chapter 513 repealed former section 95-2006, effective January 1, 1974 and enacted a new section which, except for

Amendments

Chapter 4, Laws of 1973, substituted the third sentence of subdivision (a) for a sentence reading "Two-thirds (2/3) in

number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all jurors had concurred therein"; and substituted

"unanimous concurrence" in the second sentence of subdivision (c) for "a two-thirds (2/3) concurrence."

95-2007. Sentence and judgment. (a) and (b). * * * [Same as parent volume.]

(c) If the defendant pleads guilty, or is convicted either by the court or by a jury, the court must impose a sentence of fine or imprisonment or both, as the case may be. The court may suspend the execution of the sentence up to the maximum sentence allowed for the particular offense. The court may impose any reasonable conditions or restrictions on the sentence which it deems necessary. If alcohol or other drugs are involved the court may impose such rehabilitative measures as it deems advisable under the circumstances.

(d). * * * [Same as parent volume.]

History: En. 95-2007 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 348, L. 1973.

Amendments

The 1973 amendment added the second, third and fourth sentences to subsection (c).

95-2009. Appeal.

Increased Sentence

District court may increase sentence or punishment imposed by justice of peace after trial de novo on misdemeanor charge. *State v. Fissette*, 159 M 501, 498 P 2d 1208, following *Colten v. Kentucky*, 405 US 104, 32 L Ed 2d 584, 92 S Ct 1953.

Mandamus

Since this section provides a plain, speedy and adequate remedy at law, mandamus did not lie to compel justice of the peace to honor affidavit of disqualification. *Bailey v. State*, — M —, 517 P 2d 708.

Necessity of Posting Bond

An appeal from the justice court to the district court is perfected when the defendant has posted the required bond in addition to other requirements; defendant's appeal from district court conviction of assault in the third degree was dismissed by virtue of defendant's failure to post bond requested by justice of the peace. *State v. Bush*, — M —, 518 P 2d 1406.

CHAPTER 21—POST-TRIAL MOTIONS

95-2101. New trial.

Bail

Trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was reversed and remanded for a new trial, where defendant offered evidence of good conduct while in prison, was released on bail for a period of two weeks after a verdict but appeared for sentencing, made proof as to an amount of bail and its availability, and was not a security risk; presumption of guilt sufficient to deny bail was not established by previous trial transcript where appellate court did not discuss five issues, including the sufficiency of the evidence. *State v. Campbell*, — M —, 500 P 2d 801.

Newly Discovered Evidence

Trial court did not err in denying defendant's motion for new trial based on newly discovered evidence in form of statements taken from two witnesses subsequent to trial where such statements were found to contain certain discrepancies by police officers who investigated facts and questioned such individuals and where such evidence added nothing new beyond mere speculation to existing evidence. *State v. Quigg*, 155 M 119, 467 P 2d 692.

Motion for new trial on the basis of newly discovered evidence filed in district court after thirty-day period for filing with district court was untimely and filed in the wrong court. If the grounds for

seeking a new trial do not arise until after the thirty-day period or until after the appeal is filed, the proper procedure is to stay the appeal, remand the case to the district court, file the motion, secure the district court's decision thereon, and continue with the appeal. The supreme

court has no jurisdiction to entertain a motion for new trial in the first instance where no reason is advanced nor any basis apparent for failure to follow this procedure. *State v. Best*, — M —, 503 P 2d 997.

CHAPTER 22—SENTENCE AND JUDGMENT

Section

- 95-2206. Sentence.
 95-2206.1. Sentence to death.
 95-2206.2. When no place of imprisonment is specified.
 95-2206.3. When no penalty is specified.
 95-2206.4. When no felony penalty is specified.
 95-2218. Definitions.
 95-2226. Sheriff's responsibility—cancellation or revocation of furlough.
 95-2227. Effect of conviction.
 95-2228. Fines, costs and forfeitures, how disposed of.
 95-2229. Traffic fines collected from juvenile offenders—disposition.

95-2204. Contents of investigation.

Prior Charges

Evidence of prior felony charges was admissible on presentence investigation

even though there had been no previous conviction. *State v. Harris*, 159 M 425, 498 P 2d 1222.

95-2206. Sentence. Whenever any person has been found guilty of a crime or offense upon a verdict or a plea of guilty the court may:

(1) Defer imposition of sentence for a period not to exceed one (1) year for any misdemeanor; for a period not to exceed three (3) years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

- (a) jail base release;
- (b) jail time not to exceed ninety (90) days;
- (c) conditions for probation;
- (d) restitution;
- (e) any other reasonable conditions deemed necessary for rehabilitation or for the protection of society;
- (f) any combination of the above.

(2) Suspend execution of sentence up to the maximum sentence allowed for the particular offense. The sentencing judge may impose on the defendant any reasonable restrictions during the period of suspended sentence. Such reasonable restrictions may include:

- (a) jail base release;
- (b) jail time not to exceed (90) days;
- (c) conditions for probation;
- (d) restitution;
- (e) any other reasonable conditions deemed necessary for rehabilitation or for the protection of society;
- (f) any combination of the above.

If any restrictions or conditions are violated, any elapsed time, except jail time, shall not be a credit against the sentence, unless the court shall otherwise order.

(3) Impose a fine as provided by law for the offense.

(4) Commit the defendant to a correctional institution with or without fine by law for the offense.

(5) Impose any combination of subsections (2), (3), or (4) above.

(6) The district court may also impose any of the following restrictions or conditions on the above sentence which it deems necessary to obtain the objective of rehabilitation and the protection of society:

(a) prohibit the defendant the right to hold public office;

(b) prohibit the defendant the right to own or carry a dangerous weapon;

(c) prohibit freedom of association;

(d) prohibit freedom of movement;

(e) any other limitation reasonably related to the objectives of rehabilitation or the protection of society.

(7) The judge in the justice court shall not have the authority to restrict an individual's rights as enumerated in subsection (6).

Any judge who has suspended the execution of a sentence or deferred the imposition of a sentence of imprisonment under this section, or his successor, is authorized thereafter, in his discretion, during the period of such suspended sentence or deferred imposition of sentence to revoke such suspension or impose sentence and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the state board of pardons as provided by law, or retain such jurisdiction with this court. Prior to the revocation of an order suspending or deferring the imposition of sentence, the person affected shall be given a hearing.

History: En. 95-2206 by Sec. 31, Ch. 513, L. 1973.

Compiler's Notes

Chapter 513 repealed former section 95-2206 effective January 1, 1974 and enacted a new section.

Deferred Imposition of Sentence

Trial court could revoke deferred imposition of sentence after defendant refused to testify against another defendant, even though his co-operation with the state was not made a formal condition of the judgment deferring sentence but was orally cited by the judge as his reason for deferring sentence. *State v. Lintz*, — M —, 509 P 2d 13.

DECISIONS UNDER FORMER LAW

Condition of Deferred Sentence

Conditioning deferred imposition of sentence on serving term of thirty days in county jail was proper exercise of court's sentencing authority where eighteen year old defendant entered guilty plea and was convicted on charge of sale of dangerous drugs. *State ex rel. Woodbury v. District Court*, 159 M 128, 495 P 2d 1119, distinguishing *State v. Drew*, 158 M 214, 490 P 2d 230.

Condition of Parole

Imposing the condition that parolee not be found in the company of any persons under the age of eighteen years and condition that parolee refrain from being in and around the vicinity of certain grade schools, junior high schools, and high schools were within the court's discretion. In re *Petition of Dunn*, 158 M 73, 488 P 2d 902.

Discretion of Court

The Dangerous Drug Act (54-133 (c)), contemplates that a verdict or plea will be taken and the imposition of sentence deferred or stayed for no longer than three years; the court can impose conditions of probation during the deferment which are not contradictory to a stay of sentence or deferred sentence. *State v. Drew*, 158 M 214, 490 P 2d 230, distinguished in 159 M 128, 495 P 2d 1119, 1123.

When sentencing a person under 21 pursuant to a special statute (54-133(c)) of the Dangerous Drug Act, the court's discretion is limited by the presumption of entitlement to a deferred imposition of sentence under subsection 2 of former sec. 95-2206. *State v. Drew*, 158 M 214, 490 P 2d 230.

Good Behavior

Defendant whose sentence for term of three years in state prison was ordered suspended during good behavior was improperly denied credit for time spent on parole when suspended sentence was revoked. *Barrows v. State*, 155 M 522, 474 P 2d 145.

Jury Instructions

Instructing jury on punishments that could be imposed upon conviction, including probation, deferred sentence and suspended sentence, was prejudicial error; such instructions should not be given in future cases. *State v. Zuidema*, 157 M 367, 485 P 2d 952, distinguishing *State v. Metcalf*, 153 M 369, 457 P 2d 453.

Revocation of Deferred Sentence

Where defendant was neither represented by counsel nor told of right to have counsel present at hearing for revoca-

tion of deferred sentence, district court erred in denying defendant's motion to vacate the prison sentence that was imposed as a result of the revocation. *Petition of Brittingham*, 155 M 525, 473 P 2d 830.

Where deferred sentence has been revoked, accused stands before sentencing judge as he did at time of original order; where one charged with assault in second degree and attempted rape was placed on two-year probation and thereafter was brought to trial and plead guilty to subsequent offenses, including another case of second degree assault, revocation of probation and imposition of six-year sentence on first assault charge and concurrent thirty-year sentence on second assault charge were not error. *Newman v. Estelle*, 156 M 502, 484 P 2d 276, certiorari denied 404 US 966, 92 S Ct 341.

Suspension of Sentence

Where district court decision revoking defendant's probation and imposing previously deferred sentence was reversed and remanded by supreme court three years later, defendant was placed in same status he had prior to district court's decision, so that sentence had not been suspended for more than three years contrary to subsection (2) of this section. *Petition of Brittingham*, 156 M 89, 475 P 2d 34.

Where the defendant is granted a suspended sentence, sentence is imposed and execution of sentence is suspended in whole or in part up to the maximum time of sentence allowed by law, and the defendant can be released on probation during the time interval with the conditions of probation imposed by the court. *State v. Drew*, 158 M 214, 490 P 2d 230.

95-2206.1. Sentence to death. When a person is convicted of an offense punishable by death or imprisonment, the court may sentence the offender to death or imprisonment.

History: En. 95-2206.1 by Sec. 31, Ch. 513, L. 1973.

95-2206.2. When no place of imprisonment is specified. When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, a sentence not to exceed one (1) year shall be to the county jail.

History: En. 95-2206.2 by Sec. 31, Ch. 513, L. 1973.

95-2206.3. When no penalty is specified. The court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided, or if the offense is designated a misdemeanor and no penalty is otherwise provided, may sentence the offender to a term of imprison-

ment not to exceed six (6) months in the county jail or a fine not to exceed five hundred dollars (\$500), or both. Where statutes outside of the criminal code refer to a subsequently repealed section in Title 94 for a penalty, then the penalty shall be a fine not to exceed five hundred dollars (\$500) or imprisonment in the county jail for a term not to exceed six (6) months, or both.

History: En. 95-2206.3 by Sec. 31, Ch. 513, L. 1973.

95-2206.4. When no felony penalty is specified. The court in imposing sentence upon an offender convicted of an offense which is designated as a felony, and no penalty is otherwise provided, may sentence the offender for any term not to exceed ten (10) years in the state prison.

History: En. 95-2206.4 by Sec. 31, Ch. 513, L. 1973.

DECISIONS UNDER FORMER LAW

Application

Statutes providing for punishment of felony when not otherwise prescribed was not applicable to sentence for robbery since it merely provides penalties for

crimes not otherwise provided for by statute. *Petition of Eldiwitw*, 153 M 468, 457 P 2d 909; *Petition of O'Rourke*, 154 M 265, 461 P 2d 1.

95-2207. Withdrawal of plea on a deferred imposition.

Intent of Legislature

The passage of this section demonstrates the intent of the legislature in regard to deferred imposition of sentence; if sentence were imposed or executed in any

part, then the end advantage to the entire concept of the deferred sentence could not be attained and this section would become inoperative. *State v. Drew*, 158 M 214, 490 P 2d 230.

95-2213. Merger of sentences.

Concurrent Sentence Unless Specified

Under this section, if district court does not specify whether sentence is to run concurrently or consecutively, it will run

concurrently with any prior commitment. *Petition of Parrett*, 154 M 257, 459 P 2d 268.

95-2215. Credit for incarceration prior to conviction.

Credit on Deferred Imposition of Sentence

Period of confinement in county jail was not credited to period of deferred imposition of sentence since a deferred imposition of sentence is not a judgment of imprisonment. *Petition of Gray*, — M —, 517 P 2d 351.

Credit for Time Served upon Reinstated Sentence

Prison time previously served as a condition of deferment of sentence must be credited against the prison term imposed upon revocation of petitioner's deferred imposition of sentence; defendant convicted of crime of possession of dangerous drugs, who served four months in the state prison to fulfill condition for deferred imposition of sentence, was, dur-

ing the four months, incarcerated on a bailable offense. *State ex rel. Bovee v. District Court, Sixth Judicial Dist., Park County*, — M —, 508 P 2d 1056.

Retroactive Application

This section did not apply to prisoner who was sentenced after effective date of this section for crime committed prior to such effective date. *Petition of Wilson*, 154 M 508, 463 P 2d 469.

Work Release Confinement

Where defendant had been confined under county jail work release program as condition of continuation of deferred sentence, he was entitled to credit for time in such jail upon revocation of deferment and imposition of sentence. *Maldonado v. Crist*, — M —, 510 P 2d 887.

95-2218. Definitions. Unless the context requires otherwise, in this act:

(1) "Board" means the state board of pardons provided for in section 82A-804;

(2) to (5) * * * [Same as parent volume.]

History: En. Sec. 2, Ch. 288, L. 1969; for in section 82A-804" to subdivision amd. Sec. 92, Ch. 120, L. 1974. (1); and made minor changes in phraseology and punctuation.

Amendments

The 1974 amendment added "provided

95-2226. Sheriff's responsibility—cancellation or revocation of furlough. (1) The sheriff of the county to which the prisoner has been released is responsible for the activities of the prisoner according to the rules approved by the board. The sheriff shall keep the warden informed of the prisoner's activities.

(2) If any prisoner released from actual prison confinement under the furlough program fails to comply with the rules of the furlough program, the furlough shall be canceled and the prisoner shall be returned to prison to complete his sentence. A prisoner may not be returned to prison to complete his sentence without first being charged with a violation of the rules of the furlough program in the district court of the county in which the violation took place. The prisoner is entitled to have counsel appointed to represent him at the hearing. However, if the prisoner, except where disabled from working because of a temporary illness, is unemployed for a period of thirty (30) days or more (after his availability for employment is reported in writing by the sheriff of the county to which the prisoner is released, to the department of labor and industry's office serving the area, and to the union to which the prisoner belongs, if any) the warden, upon request of the sheriff and upon a showing by the sheriff of the county in the district court either that: (a) the employee has been so unemployed, (b) the prisoner has become so disabled that he is unemployable, or (c) the prisoner is on an education furlough and the prisoner has demonstrated for a period of six (6) weeks or more than he is unable to benefit from the schooling or training, shall revoke the furlough and the prisoner shall be returned to the prison.

History: En. Sec. 10, Ch. 288, L. 1969; amd. Sec. 93, Ch. 120, L. 1974.

county to which said prisoner has been furloughed in a district court of said county, then the warden" following "schooling or training" in item (c) of subsection (2); and made minor changes in phraseology, punctuation and style.

Amendments

The 1974 amendment added "of the prisoner's activities" at the end of subsection (1); substituted "department of labor and industry's office" for "Montana unemployment compensation commission office" in the fourth sentence of subsection (2); deleted "or when said warden shall revoke said furlough and said prisoner is returned to said prison" before item (c) in subsection (2); deleted "then upon such a showing being made by the sheriff of the

Parole Violation

This section did not apply to prisoner released on parole but not on furlough, and prisoner was not entitled to counsel as a matter of right at hearing on parole violation. Petition of Osier, 156 M 165, 477 P 2d 344.

95-2227. Effect of conviction. (1) Conviction of any offense shall not deprive the offender of any civil or constitutional rights except as they

shall be specifically enumerated by the sentencing judge as necessary conditions of the sentence directed toward the objectives of rehabilitation and the protection of society.

(2) No person shall suffer any civil or constitutional disability not specifically included by the sentencing judge in his order of sentence.

(3) When a person has been deprived of any of his civil or constitutional rights by reason of conviction for an offense and his sentence has expired or he has been pardoned he shall be restored to all civil rights and full citizenship, the same as if such conviction had not occurred.

History: En. 95-2227 by Sec. 9, Ch. 513, L. 1973.

DECISIONS UNDER FORMER LAW

Inheritance by Slayer From Decedent

Wife who unlawfully killed husband could not take from his estate by dower or intestate succession, nor take his share

in jointly owned property, but rather she became constructive trustee for other beneficiaries and devisees. *Sikora v. Sikora*, — M —, 499 P 2d 808.

95-2228. Fines, costs and forfeitures, how disposed of. All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue, if not otherwise provided by law, must be paid to the county treasurer of the county in which the court is held and by him credited as provided by law. If the said fine or forfeiture is paid to the county treasurer at the time of such payment there shall be filed with the county treasurer, a complete statement showing the total of the fine or forfeiture received or incurred with an itemized statement of the costs incurred by the county in such action, which statement shall give the title of the cause and be subscribed by the person or officer making such payment.

History: En. 95-2228 by Sec. 10, Ch. 513, L. 1973.

95-2229. Traffic fines collected from juvenile offenders—disposition. All fines collected by the district courts from children under eighteen (18) years of age for unlawful operation of motor vehicles resulting from traffic summonses issued by the peace officers of the cities, counties, or by highway patrolmen, together with that portion of the fines which is specified in section 75-7903 shall be retained by the county treasurer of the county in which the offense occurred and at the end of each month distributed as follows:

(a) fines collected as the result of summonses issued by city police officers shall be distributed to the city in which the police officer is employed, and credited to the city general fund;

(b) fines collected as the result of summonses issued by county peace officers shall be retained by the county treasurer and credited to the county road fund;

(c) fines collected as the result of summonses issued by state highway patrolmen shall be paid to the state treasurer of Montana and by him credited to the general fund of the state;

(d) that portion of the fines, as provided for in section 75-7903, shall be paid to the state treasurer of Montana and by him credited to the automobile driver education account in the earmarked revenue fund.

History: En. 95-2229 by Sec. 11, Ch. 513, L. 1973.

CHAPTER 23—EXECUTION OF SENTENCE

Section

95-2305. Proceedings upon finding of lack of mental fitness.

95-2311. Hearings requested by other states—power of board of pardons and department of institutions to hold.

95-2305. Proceedings upon finding of lack of mental fitness. If it is found that defendant is mentally fit as provided in section 95-2304, the sheriff must execute the judgment; but if it is found that he lacks fitness, the execution of judgment must be suspended and the court shall commit him to the custody of the superintendent of Warm Springs state hospital, to be placed in an appropriate institution of the department of institutions for so long as the lack of fitness endures. When the court, on its own motion or upon application of the superintendent of Warm Springs state hospital, or the county prosecuting officer, or the defendant or his legal representative, determines after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the sheriff shall be directed by the court to carry out the execution. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant, that it would be unjust to proceed with execution of the sentence, the court may suspend the execution of the sentence and may order the defendant to be discharged.

History: En. 95-2305 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 94, Ch. 120, L. 1974.

Amendments

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state

hospital" in the first and second sentences; substituted "department of institutions" for "state department of public institutions" in the first sentence; and made minor changes in phraseology and punctuation.

95-2311. Hearings requested by other states—power of board of pardons and department of institutions to hold. The board of pardons and the department of institutions shall hold such hearings as may be requested by any other party state pursuant to section 95-2308, subsection 4 (f) of the Western Interstate Corrections Compact.

History: En. 95-2311 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 95, Ch. 120, L. 1974.

Amendments

The 1974 amendment substituted "board of pardons" for "board of pardons and paroles"; substituted "department of institutions" for "state department of institutions"; and made minor changes in phraseology.

Repealing Clause

Section 96 of Ch. 120, Laws 1974 read "Sections 38-108(1), 38-117, 38-119, 38-406.1, 69-6402, 80-1404, 80-1407 through 80-1409, 80-2207, 80-2311, 80-2601 through 80-2603, 82-903, 82A-802, 82A-803, 82A-807, 94-3208, 94-9851, R. C. M. 1947, are repealed."

CHAPTER 24—APPEAL BY STATE AND DEFENDANT

95-2404. Scope of appeal.**Question of Law**

Contention by appellant that he was improperly sentenced for violation of Dangerous Drug Act due to lack of evidence necessary to overcome presumption regard-

ing sentencing of persons 21 years old or under was clearly legal question properly addressed to supreme court. *State v. Simtob*, 154 M 286, 462 P 2d 873.

95-2412. Ruling against respondent may be reviewed.**Harmless Error**

Instructing jury on assault by willfully inflicting grievous bodily harm when defendant had been charged with assault with intent to prevent or resist his law-

ful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. *State v. Jones*, — M —, 505 P 2d 97.

95-2425. Substantial and insubstantial errors on appeal.**Comments on Defendant's Past Record**

Statement by prosecuting attorney in closing argument that the perpetrators of the crime were "thick as thieves" was not construed as a comment on the past record of the defendant but merely as an argument that the defendant was guilty of the robbery of which he was charged in that prosecution and did not affect any substantial right of the defendant. *State v. Romero*, — M —, 505 P 2d 1207.

with intent to prevent or resist his lawful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. *State v. Jones*, — M —, 505 P 2d 97.

Jury Instructions

Instructing jury on assault by willfully inflicting grievous bodily harm when defendant had been charged with assault

Technical Errors—Witness's Remarks

Where trial court on defendant's motion directed state's witnesses not to reveal victim's pregnancy, fact that one witness mentioned the pregnancy to jury did not provide basis for mistrial, since no substantial right was affected. *State v. Bentley*, 155 M 383, 472 P 2d 864.

95-2428. Indigent appeals.**Determining Financial Need**

It would have been unconscionable to permit proceeding in forma pauperis by petitioner whose income for previous year was \$13,000 and who had house, vehicles

and furniture worth over \$11,000, even though petitioner had only a small bank balance and owed over \$800 in taxes. *Petition of Allen*, 156 M 163, 476 P 2d 510.

CHAPTER 25—APPELLATE REVIEW OF LEGAL SENTENCES

95-2503. Review—decision.**Sentence Increase**

Increase of sentence under this section did not constitute double jeopardy or denial of due process or equal protection of the laws. *State v. Henrich*, — M —, 509 P 2d 288.

ter provides appellate review of "legal" sentences and therefore could not review contention by defendant that his sentence under Dangerous Drug Act was "illegal" under statutory presumption regarding sentencing. *State v. Simtob*, 154 M 286, 462 P 2d 873.

Questions Reviewable

Review division established by this chap-

CHAPTER 26—POST-CONVICTION HEARING

95-2601. Petition in the trial court.

NOTE.—Uniform State Law. The following states have enacted the Uniform Post-Conviction Procedure Act: Arkansas,

Idaho, Iowa, Maryland, Minnesota, Nevada, North Dakota, Oregon, South Carolina and South Dakota.

CHAPTER 27—HABEAS CORPUS

95-2701. Who may prosecute writ.**Indigent Prisoners**

Denial of trial transcript to an indigent prisoner does not violate his rights unless there has been some showing of need or a meritorious reason; denial of transcript did not deprive prisoner of his right

of access to courts where transcript was requested for purpose of searching for possible error on which to base a collateral attack on his sentence. Petition of Parker, — M —, 511 P 2d 973.

95-2716. No release for technical defects.**Technical Defects**

Where court intended to vacate sentence to permit representation by counsel but said that it was vacating judgment, this

was a mere technical defect and would not form the basis for habeas corpus. Petition of Eldiwtiw, 153 M 468, 457 P 2d 909.

CHAPTER 28—IMPEACHMENT

Section

95-2801. Officers liable to impeachment.

95-2802. Sole power of impeachment.

95-2803 to 95-2817. [Transferred from Title 94.]

95-2819. [Transferred from Title 94.]

95-2801. (11668) Officers liable to impeachment. The governor, executive officers, heads of state departments, and judicial officers shall be liable to impeachment for felonies and misdemeanors, or malfeasance in office.

History: Our present impeachment laws are substantially the same as the territorial acts which provided for trial by the council. See Secs. 41-62, pp. 196-199, Cod. Stat. 1871; re-en. as Secs. 41-62, 3d Div. Rev. Stat. 1879; re-en. as Secs. 41-63, 3d Div. Comp. Stat. 1887; re-en. Sec. 1500, Pen. C. 1895; re-en. Sec. 8972, Rev. C. 1907; re-en. Sec. 11668, R. C. M. 1921; Sec. 94-5401, R. C. M. 1947; amd. Sec. 2, Ch. 5, L. 1973; redes. 95-2801 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 737.

Compiler's Notes

Section 95-2801, as shown in bound Volume Eight, is still in force as section

95-103. However, it has not been reprinted in this supplement under its new number since there has been no change in text.

The section shown above as sec. 95-2801 was formerly sec. 94-5401 but was redesignated by Ch. 513, Laws of 1973. For the prior version, see bound Volume Eight under 94-5401.

Amendments

The 1973 amendment substituted "executive officers, heads of state departments" for a reference to other state officers; deleted "except justices of the peace" following "judicial officers"; and substituted "felonies" for "high crimes."

95-2802. (11669) Sole power of impeachment. The sole power of impeachment vests in the house of representatives; the concurrence of two-thirds ($\frac{2}{3}$) of all the members being necessary to the exercise thereof. Impeachment shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

History: En. Sec. 1501, Pen. C. 1895; re-en. Sec. 8973, Rev. C. 1907; re-en. Sec. 11669, R. C. M. 1921; Sec. 94-5402, R. C. M. 1947; amd. Sec. 1, Ch. 10, L. 1973; redes. 95-2802 by Sec. 29, Ch. 513, L. 1973.

Compiler's Notes

Section 95-2802, as shown in bound Volume Eight, is still in force as section 95-104. However, it has not been reprinted in this supplement under its new

number since there has been no change in text.

The section shown above as sec. 95-2802 was formerly sec. 94-5402 but was redesignated by Ch. 513, Laws of 1973. For the prior version, see bound Volume Eight under 94-5402.

Amendments

The 1973 amendment increased the vote in the house of representatives required by the first sentence from a majority to two-thirds of all members.

95-2803 to 95-2817. [Transferred from Title 94.]

Compiler's Notes

Sections 95-2803 to 95-2806, as shown in bound Volume Eight, are still in force as secs. 95-105 to 95-108. However, they have not been reprinted in this supplement under their new numbers since there has been no change in text.

Present sections 95-2803 to 95-2817 were originally numbered 94-5403 to 94-5417. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not reprinted here but may be found in bound Volume Eight as follows:

New Sec.

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95-2806
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95-2819. [Transferred from Title 94.]

Compiler's Notes

This section was originally numbered 94-5419. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this

title. Because there has been no change in the section, it is not reprinted here but may be found as sec. 94-5419 in bound Volume Eight.

CHAPTER 29—PRESUMPTION OF INNOCENCE

Section

95-2901, 95-2902. [Transferred from Title 94.]

95-2901. (11971) Defendant presumed innocent—reasonable doubt.

Compiler's Notes

This section was originally numbered 94-7203. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7203.

Burden of Proof

Jury instruction taken verbatim from section 94-2704.1 that stated that possession of recently stolen livestock is prima facie evidence of guilt of larceny did not constitute reversible error, since, even though state has burden of proof in criminal cases, the burden of evidence may shift to defendant. State v. Gloyne, 156 M 94, 476 P 2d 511.

Circumstantial Evidence

Conviction of defendant on charge of burglary in first degree on only circum-

stantial evidence consisting of ten rolls of half-dollars, three of which had been identified by store owner in front of witness, fact that defendant's father-in-law two weeks after burglary had deposited these rolls of half-dollars in bank after receiving them from defendant in payment of debt, and testimony by one witness that she had seen defendant in store two days before burglary, did not violate this section on grounds that evidence was insufficient to warrant conviction; burden of proof never shifts, but burden of evidence may shift frequently, and where all evidence is circumstantial, test is whether facts and circumstances are of such quality and quantity to support jury determination of guilt beyond reasonable doubt; fact alone that evidence is circumstantial is not sufficient grounds to justify reversal. State v. Proctor, 153 M 90, 454 P 2d 616.

95-2902. [Transferred from Title 94.]**Compiler's Notes**

This section was originally numbered 94-7204. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this title.

Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7204.

CHAPTER 30—EVIDENCE**Section**

95-3001, 95-3002. [Transferred from Title 94.]

95-3004. The burden in a homicide trial.

95-3010, 95-3011. [Transferred from Title 94.]

95-3012. Testimony of person legally accountable.

95-3001, 95-3002. [Transferred from Title 94.]**Compiler's Notes**

These sections were originally numbered 94-7209 and 94-7210. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not re-

printed here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3001	94-7209
95-3002	94-7210

95-3004. The burden in a homicide trial. (a) In a homicide trial, before an extrajudicial confession may be admitted into evidence, the state must introduce independent evidence tending to establish the death, and that the death was caused by a criminal agency.

(b) In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances or mitigation, excuse or justification appear.

History: En. 95-3004 by Sec. 12, Ch. 513, L. 1973.

DECISIONS UNDER FORMER LAW**Mitigation**

Stepfather charged with murder in beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her; since evidence relied

on by prosecution to establish guilt also tended to show circumstances of mitigation, defendant did not have burden of coming forth with proof of mitigation as prerequisite to instructions on lesser offense of manslaughter. *State v. Taylor*, — M —, 515 P 2d 695.

95-3010. [Transferred from Title 94.]**Compiler's Notes**

This section was originally numbered 94-8801. Section 29, Ch. 513, Laws of 1973 renumbered it to appear in this

title. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-8801.

95-3011. (12176) Competency of husband and wife as witnesses.**Compiler's Notes**

This section was originally numbered 94-8802. Section 29, Ch. 513, Laws of 1973 renumbered it to appear in this title. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-8802.

Neglect of Children

Wife could testify against husband in homicide prosecution for alleged beating death of her child since such conduct amounted to "neglect" of child within this section; "neglect" includes any abuse of children whether inflicted negligently or intentionally; this section, rather than 93-701-4 (1), was applicable in determining any marital privilege. *State v. Taylor*, — M —, 515 P 2d 695.

95-3012. Testimony of person legally accountable. A conviction cannot be had on the testimony of one responsible or legally accountable for the same offense, as defined in section 94-2-106, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the one responsible or legally accountable for the same offense, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, it merely shows the commission of the offense, or the circumstances thereof.

History: En. 95-3012 by Sec. 13, Ch. 513, L. 1973.

Sufficiency of Corroborative Evidence

Identification of defendants by pharmacist whose pharmacy had been robbed and

by witnesses who observed defendants and their car fleeing the scene of the robbery constituted sufficient independent corroboration of accomplice's testimony to support a conviction of robbery. *State v. Spielmann*, — M —, 516 P 2d 617.

DECISIONS UNDER FORMER LAW

Accomplice's Testimony Corroborated

Testimony of accomplice to burglary was sufficiently corroborated by evidence that defendant owned car involved in burglary, had attended same party with other principals in burglary, was with other principals in grocery earlier on day of burglary, and admitted being in house where stolen property was discovered and knew it was there. *State v. Dess*, 154 M 231, 462 P 2d 186.

In prosecution for second degree murder, accomplice's testimony that defendant had bludgeoned teen-age girl to death after the accomplice and the defendant had raped her was sufficiently corroborated by medical evidence that the girl had been raped, testimony of witnesses

who identified the coat which defendant had worn that night and upon which the FBI had found blood spots, and testimony of a friend of defendant that defendant had told her in the presence of another of the death of the girl. *State v. Perry*, — M —, 505 P 2d 113.

Who Is An Accomplice

Witness who was serving last two days of thirty-day sentence was not an accomplice where he neither acted voluntarily nor had any common intent with principals in attempted jailbreak; it was not necessary that his testimony be corroborated. *State v. Zuidema*, 157 M 367, 485 P 2d 952.

CHAPTER 31—UNIFORM CRIMINAL EXTRADITION ACT

Section

- 95-3101. Definitions.
- 95-3102. Fugitives from justice—duty of governor.
- 95-3103. Demand—form.
- 95-3104. Investigation by governor.
- 95-3105. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.
- 95-3106. Extradition of persons not present in demanding state at time of commission of crime.
- 95-3107. Issuance of warrant of arrest by governor—recitals therein.
- 95-3108. Execution of warrant—manner and place thereof.
- 95-3109. Authority of arresting officer.
- 95-3110. Rights of accused persons—application for writ of habeas corpus.
- 95-3111. Penalty for noncompliance with preceding section.
- 95-3112. Confinement of accused in jail when necessary.
- 95-3113. Arrest of accused before making of requisition.
- 95-3114. Arrest of accused without warrant therefor.
- 95-3115. Commitment to await requisition—bail.
- 95-3116. Bail—in what cases—conditions of bond.
- 95-3117. Extension of time of commitment adjournment.
- 95-3118. Bail—when forfeited.
- 95-3119. Persons under criminal prosecution in this state at time of requisition.
- 95-3120. Guilt or innocence of accused, when inquired into.
- 95-3121. Alias warrant of arrest.
- 95-3122. Fugitives from this state—duty of governors.

- 95-3123. Application for issuance of requisition—by whom made—contents.
95-3124. Fugitives from this state—accounts.
95-3125. No fee to be paid to public officer procuring surrender.
95-3126. Receiving fee for services in arresting fugitives.
95-3127. Immunity from service of process in certain civil actions.
95-3128. Written waiver of extradition proceedings.
95-3129. Nonwaiver by this state.
95-3130. No immunity from other criminal prosecutions while in this state.
95-3131 to 95-3136. [Transferred from Title 94.]

95-3101. Definitions. Where appearing in this act, the term “governor” includes any person performing the functions of governor by authority of the law of this state. The term “executive authority” includes the governor, and any person performing the functions of governor in a state other than this state. The term “state,” referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

History: En. 95-3101 by Sec. 14, Ch. 513, L. 1973.

95-3102. Fugitives from justice—duty of governor. Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

History: En. 95-3102 by Sec. 14, Ch. 513, L. 1973.

95-3103. Demand—form. No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 95-3106, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

History: En. 95-3103 by Sec. 14, Ch. 513, L. 1973.

95-3104. Investigation by governor. When a demand shall be made upon the governor of this state by the executive authority of another

state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

History: En. 95-3104 by Sec. 14, Ch. 513, L. 1973.

95-3105. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the governor of any other state any person in this state who is charged in the manner provided in section 95-3123 with having violated the laws of the state whose governor is making the demand, even though such person left the demanding state involuntarily.

History: En. 95-3105 by Sec. 14, Ch. 513, L. 1973.

95-3106. Extradition of persons not present in demanding state at time of commission of crime. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 95-3103 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

History: En. 95-3106 by Sec. 14, Ch. 513, L. 1973.

95-3107. Issuance of warrant of arrest by governor—Recitals therein. If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History: En. 95-3107 by Sec. 14, Ch. 513, L. 1973.

95-3108. Execution of warrant—manner and place thereof. Such warrant shall authorize the peace officer or other person to whom directed

to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.

History: En. 95-3108 by Sec. 14, Ch. 513, L. 1973.

95-3109. Authority of arresting officer. Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

History: En. 95-3109 by Sec. 14, Ch. 513, L. 1973.

95-3110. Rights of accused persons—application for writ of habeas corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall be first taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and what he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

History: En. 95-3110 by Sec. 14, Ch. 513, L. 1973.

95-3111. Penalty for noncompliance with preceding section. Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience of the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars (\$1,000) or be imprisoned not more than six (6) months, or both.

History: En. 95-3111 by Sec. 14, Ch. 513, L. 1973.

95-3112. Confinement of accused in jail when necessary. The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

History: En. 95-3112 by Sec. 14, Ch. 513, L. 1973.

95-3113. Arrest of accused before making of requisition. Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, and except in cases arising under section 95-3106 with having fled from justice, or, with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation, or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 95-3106, has fled from justice, or with having been convicted of a crime in that state and having escaped from bail, probation, or parole and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer charge or complaint and affidavit and a certified copy of the sworn charge or complaint or affidavit upon which the warrant is issued shall be attached to the warrant.

History: En. 95-3113 by Sec. 14, Ch. 513, L. 1973.

95-3114. Arrest of accused without warrant therefor. The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth

the ground for the arrest as in the preceding section; and thereafter this answer shall be heard as if he had been arrested on a warrant.

History: En. 95-3114 by Sec. 14, Ch. 513, L. 1973.

95-3115. Commitment to await requisition—Bail. If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and, except, in cases arising under section 95-3106 that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty (30) days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

History: En. 95-3115 by Sec. 14, Ch. 513, L. 1973.

95-3116. Bail—in what cases—conditions of bond. Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state.

History: En. 95-3116 by Sec. 14, Ch. 513, L. 1973.

95-3117. Extension of time of commitment adjournment. If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, a judge or magistrate may discharge him or may recommit him for a further period of sixty (60) days or a supreme court justice or county judge may again take bail for his appearance and surrender, as provided in section 95-3116, but with a period not to exceed sixty (60) days after the date of such new bond or undertaking.

History: En. 95-3117 by Sec. 14, Ch. 513, L. 1973.

95-3118. Bail—when forfeited. If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

History: En. 95-3118 by Sec. 14, Ch. 513, L. 1973.

95-3119. Persons under criminal prosecution in this state at time of requisition. If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

History: En. 95-3119 by Sec. 14, Ch. 513, L. 1973.

95-3120. Guilt or innocence of accused, when inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor, or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

History: En. 95-3120 by Sec. 14, Ch. 513, L. 1973.

Presence in Demanding State

This section does not prevent inquiry in habeas corpus proceedings brought by

the accused as to whether the accused was in the demanding state at the time of the offense, and the accused should have been allowed to introduce evidence that he was not. State ex rel. Hart v. District Court, 157 M 287, 485 P 2d 698.

95-3121. Alias warrant of arrest. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

History: En. 95-3121 by Sec. 14, Ch. 513, L. 1973.

95-3122. Fugitives from this state—duty of governors. Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the chief executive of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

History: En. 95-3122 by Sec. 14, Ch. 513, L. 1973.

95-3123. Application for issuance of requisition—by whom made—contents. I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and

return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county from which the escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the government indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

History: En. 95-3123 by Sec. 14, Ch. 513, L. 1973.

95-3124. Fugitives from this state—accounts. When the governor of this state, in the exercise of the authority conferred by section 2, article IV, of the constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners, and paid out of the state treasury.

History: En. 95-3124 by Sec. 14, Ch. 513, L. 1973.

95-3125. No fee to be paid to public officer procuring surrender. No compensation, fee or reward of any kind can be paid to or received by a public officer of this state, or other person, for a service rendered in procuring from the governor the demand mentioned in section 95-3124 or for the surrender of the fugitive or for conveying him to this state, or detaining him therein, except as provided for in such section.

History: En. 95-3125 by Sec. 14, Ch. 513, L. 1973.

95-3126. Receiving fee for services in arresting fugitives. Every person who violates any of the provisions of section 95-3125 is guilty of a misdemeanor.

History: En. 95-3126 by Sec. 14, Ch. 513, L. 1973.

95-3127. Immunity from service of process in certain civil actions. A person brought into this state on, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceedings, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

History: En. 95-3127 by Sec. 14, Ch. 513, L. 1973.

95-3128. Written waiver of extradition proceedings. Any person of this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation, or parole may waive the issuance and service of the warrant provided for in sections 95-3107 and 95-3108 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 95-3110.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality, to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights, or duties of the officers of the demanding state or of this state.

History: En. 95-3128 by Sec. 14, Ch. 513, L. 1973.

95-3129. Nonwaiver by this state. Nothing in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person from crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, a sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, ex-

tradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

History: En. 95-3129 by Sec. 14, Ch. 513, L. 1973.

95-3130. No immunity from other criminal prosecutions while in this state. After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History: En. 95-3130 by Sec. 14, Ch. 513, L. 1973.

95-3131 to 95-3136. [Transferred from Title 94.]

Compiler's Notes	New Sec.	Vol. 8
These sections were originally numbered	95-3131	94-1101-1
94-1101-1 to 94-1101-6. Section 29, Ch. 513,	95-3132	94-1101-2
Laws of 1973, renumbered them to ap-	95-3133	94-1101-3
pear in this title. Because there has been	95-3134	94-1101-4
no change in text, the sections are not	95-3135	94-1101-5
reprinted here but may be found in bound	95-3136	94-1101-6
Volume Eight as follows:		

CHAPTER 32—PROBATION, PAROLE AND CLEMENCY

Section

- 95-3201, 95-3202. [Transferred from Title 94.]
- 95-3202.1. Retaking or re-incarceration of parolee or probationer under interstate supervision.
- 95-3202.2. Hearing officers for interstate cases.
- 95-3202.3. Notice of allegations—counsel—confrontation of witnesses—record.
- 95-3202.4. Record of hearing in another state to have effect in Montana.
- 95-3203. [Transferred from Title 94.]
- 95-3204. Board of pardons.
- 95-3205. Definitions.
- 95-3206. Orders, records, report.
- 95-3207. Administrator and employees.
- 95-3209. [Transferred from Title 94.]
- 95-3210. Duties of the administrator.
- 95-3211 to 95-3213. [Transferred from Title 94.]
- 95-3214. Parole authority and procedure.
- 95-3215. Conditional release.
- 95-3216 to 95-3219. [Transferred from Title 94.]
- 95-3220. Return of parole violator.
- 95-3221, 95-3222. [Transferred from Title 94.]
- 95-3223. Cases of executive clemency.
- 95-3224. Notice of hearing on applications for executive clemency.
- 95-3225 to 95-3227. [Transferred from Title 94.]
- 95-3228. When publication not necessary.
- 95-3229 to 95-3232. [Transferred from Title 94.]

95-3201. Governor may make interstate compact for control of crime, etc.

Compiler's Notes

This section was originally numbered 94-7901. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7901.

NOTE.—Uniform State Law. The following states have enacted the Uniform Act of Out of State Parolee Supervision: Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New

Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.

Constitutionality

Requirement that parolee sign waiver of extradition before release to another state was not unconstitutional, and parolee could be detained for parole violation by unauthorized departure from the host state. In re Petition of Schwartz, 154 M 505, 463 P 2d 316, certiorari denied 398 US 913, 90 S Ct. 1413.

95-3202. [Transferred from Title 94.]

Compiler's Notes

This section was originally numbered 94-7902. Section 2, Ch. 513, Laws of 1973, renumbered it to appear in this title. Be-

cause there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7902.

95-3202.1. Retaking or re-incarceration of parolee or probationer under interstate supervision. Where supervision of a parolee or probationer is being administered pursuant to the interstate compact for the supervision of parolees and probationers, the appropriate judicial or administrative authorities in this state shall notify the compact administrator of the sending state whenever, in their view, consideration should be given to retaking or re-incarceration for a parole or probation violation. Prior to the giving of any such notification, a hearing shall be held in accordance with this act within a reasonable time, unless such hearing is waived by the parolee or probationer. The appropriate officer or officers of this state shall as soon as practicable, following termination of any such hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state. Pending any proceeding pursuant to this section, the appropriate officers of this state may take custody of and detain the parolee or probationer involved for a period not to exceed fifteen (15) days prior to the hearing and, for such reasonable period after the hearing or waiver as may be necessary to arrange for the retaking or re-incarceration if it appears to the hearing officer or officers that retaking or re-incarceration is likely to follow.

History: En. Sec. 1, Ch. 75, L. 1973.

Title of Act

An act providing for interstate parole and probation hearing procedures, re-

quiring notice, assistance of counsel, confrontation of witnesses under certain conditions, a hearing record, and authorizing out-of-state hearings.

95-3202.2. Hearing officers for interstate cases. Any hearing pursuant to this act may be held before the administrator of the interstate compact for the supervision of parolees and probationers, a deputy of such administrator, or any other person authorized pursuant to the laws of this state to hear cases of alleged parole or probation violation, except that no hearing officer shall be the person making the allegation of violation.

History: En. Sec. 2, Ch. 75, L. 1973.

95-3202.3. Notice of allegations—counsel—confrontation of witnesses—record. With respect to any hearing pursuant to this act, the parolee or probationer:

(1) Shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that its purpose is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of parole or probation.

(2) Shall be permitted to consult with any persons whose assistance he reasonably desires, prior to the hearing.

(3) Shall have the right to confront and examine any persons who have made allegations against him, unless the hearing officer determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons.

(4) May admit, deny or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contentions. A record of the proceedings shall be made and preserved.

History: En. Sec. 3, Ch. 75, L. 1973.

95-3202.4. Record of hearing in another state to have effect in Montana.

In any case of alleged parole or probation violation by a person being supervised in another state pursuant to the interstate compact for the supervision of parolees and probationers, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this act, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer or officers in this state, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer or officers of this state in making disposition of the matter.

History: En. Sec. 4, Ch. 75, L. 1973.

95-3203. [Transferred from Title 94.]

Compiler's Notes

This section was originally numbered 94-9821. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this title.

Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9821.

95-3204. Board of pardons.

(1) The board of pardons shall administer the executive clemency, probation and parole system, and shall endeavor to secure the effective application and improvement of that system and the laws upon which it is based.

(2) The board shall meet at least once each month at the state prison.

(3) The principal office of the board shall be in Deer Lodge.

History: En. Sec. 2, Ch. 153, L. 1955; Sec. 94-9822, R. C. M. 1947; redes. 95-3204 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 81, Ch. 120, L. 1974.

Amendments

The 1974 amendment rewrote this section (for former law, see section 94-9822 in bound Volume Eight).

95-3205. Definitions. Unless the context requires otherwise, in this act:

(1) "Board" means the board of pardons provided for in section 82A-804.

(2) "Probation" means the release by the court without imprisonment except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the board upon direction of the court.

(3) "Parole" means the release to the community of a prisoner by the decision of the board prior to the expiration of his term, subject to conditions imposed by the board and subject to its supervision.

(4) "Executive clemency" refers to the powers of the governor as provided by section 12 of article VI of the constitution of Montana.

History: En. Sec. 3, Ch. 153, L. 1955; Sec. 94-9823, R. C. M. 1947; amd. Sec. 1, Ch. 73, L. 1973; redes. 95-3205 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 82, Ch. 120, L. 1974.

Amendments

The 1973 amendment changed the con-

stitutional reference in subdivision (4) from section 9 of article VII of the 1889 constitution to section 12 of article VI of the new constitution.

The 1974 amendment inserted subdivision (1); and made minor changes in phraseology, punctuation and style.

95-3206. Orders, records, report. Decisions of the board shall be by majority vote. The orders of the board are not reviewable except as to compliance of terms of this act. The department of institutions shall keep a record of the board's acts and decisions available to the public. However, all social records, including the pre-sentence report, the pre-parole report and the supervision history obtained in the discharge of official duty by any member or employee of the board, shall be confidential and shall not be disclosed directly or indirectly to anyone other than the members of the board or a judge. The board or a court may in its discretion, when the best interest or welfare of a particular defendant or prisoner makes such action desirable or helpful, permit the inspection of the report or any parts thereof by the prisoner or his attorney.

History: En. Sec. 4, Ch. 153, L. 1955; amd. Sec. 42, Ch. 93, L. 1969; redes. 95-3206 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 83, Ch. 120, L. 1974.

Amendments

The 1974 amendment deleted a former first sentence relating to adoption of an official seal; deleted a second sentence relating to a majority of the board con-

stituting a quorum; substituted "shall be" for "may be" before "by majority vote" in the present first sentence; substituted "department" for "board" at the beginning of the third sentence; deleted a final sentence relating to the board reporting as provided in section 82-4002; and made minor changes in phraseology and punctuation.

95-3207. Administrator and employees. The board shall appoint an administrator of probation and parole, hereinafter referred to as the "administrator" who appoints, with the approval of the board, an assistant administrator, probation and parole officers, and other employees required to administer this act. The administrator is also the interstate compact administrator. All other officers and employees of the board shall receive compensation for their services as fixed by the board. All officers and employees of the board shall hold office at the pleasure of the board and

shall perform the duties which are imposed on them by law or by the board.

History: En. Sec. 5, Ch. 153, L. 1955; amd. Sec. 1, Ch. 122, L. 1957; amd. Sec. 1, Ch. 97, L. 1961; amd. Sec. 10, Ch. 225, L. 1963; amd. Sec. 16, Ch. 237, L. 1967; redes. 95-3207 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 84, Ch. 120, L. 1974.

Amendments

The 1974 amendment substituted references to "administrator of probation and

parole" for "state director of probation and parole"; inserted "The administrator is also the interstate compact administrator"; deleted two sentences relating to the salary of the former director; deleted a second paragraph providing that all salaries are to be paid monthly subject to approval of the board; and made minor changes in phraseology and punctuation.

95-3208. Repealed.

Repeal

Section 95-3208 (Sec. 6, Ch. 153, L. 1955; Sec. 12, Ch. 97, L. 1961; Sec. 94-9826, R. C. M. 1947; redes. 95-3208 by Sec. 29,

Ch. 513, L. 1973), relating to payment of expenses of the board of pardons, was repealed by Sec. 96, Ch. 120, Laws of 1974.

95-3209. [Transferred from Title 94.]

Compiler's Notes

This section was originally numbered 94-9827. Section 29, Ch. 513, Laws of 1973 renumbered it to appear in this

title. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9827.

95-3210. Duties of the administrator. The administrator is the executive officer of the board. He is responsible for any investigation and supervision requested by the board or the courts. The administrator, subject to the direction and supervision of the department under section 82A-108, shall:

(1) Subject to the approval of the board, divide the state into districts, and assign probation and parole officers to serve in these districts and courts;

(2) Obtain any necessary office quarters for the staff in each district;

(3) Assign the secretarial, bookkeeping, and accounting work to the clerical employees, including receipt and disbursement of money;

(4) Direct the work of the probation and parole officers and other employees assigned to him;

(5) Formulate methods of investigation, supervision, recordkeeping, and reports;

(6) Conduct training courses for the staff;

(7) Co-operate with all agencies, public and private, which are concerned with the treatment or welfare of persons on probation or parole;

(8) Administer the interstate compact for the supervision of parolees and probationers.

History: En. Sec. 8, Ch. 153, L. 1955; Sec. 94-9828, R. C. M. 1947; redes. 95-3210 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 85, Ch. 120, L. 1974.

Amendments

The 1974 amendment rewrote this section (for former law, see section 94-9828 in bound Volume Eight).

95-3211. [Transferred from Title 94.]

Compiler's Notes

This section was originally numbered

94-9829. Section 29, Ch. 513, Laws of 1973 renumbered it to appear in this title.

Because there has been no change in text, the section is not reprinted here but may

be found in bound Volume Eight as sec. 94-9829.

95-3212. Conditions of probation or suspension of sentence.

Compiler's Notes

This section was originally numbered 94-9830. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this title. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9830.

Conditions for Parole

Where parolee was ordered not to be

found in the company of persons under the age of eighteen and to refrain from being in and around the vicinity of certain grade schools, junior high schools, and high schools under section 95-2206, and he was further restricted to Silver Bow county, excluding the city of Butte, the latter condition does not violate this section. In re Petition of Dunn, 158 M 73, 488 P 2d 902.

95-3213. Arrest—subsequent disposition.

Compiler's Notes

This section was originally numbered 94-9831. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9831.

Parole Violation

This section does not require parolee to be taken before court for complete hearing on parole violation but provides only for persons on probation or on suspended sentence. Petition of Spurlock, 153 M 475, 458 P 2d 80.

95-3214. Parole authority and procedure. (1) The board shall release on parole, by appropriate order, any person confined in the Montana state prison, except persons under sentence of death, when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community, provided:

(a) That no convict serving a time sentence shall be paroled until he has served at least one-quarter ($\frac{1}{4}$) of his full term, less good time allowances off, as provided in section 80-1905; except that any convict serving a time sentence may be paroled after he has served, upon his term of sentence, twelve and one-half ($12\frac{1}{2}$) years.

(b) No convict serving a life sentence shall be paroled until he has served twenty-five (25) years, less the good time allowances off, as provided in section 80-1905.

(2) Within two (2) months after his admission and at such intervals thereafter as it determines, the board shall consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, and attitude in prison, and the reports of and physical and mental examinations which have been made.

(3) Before ordering the parole of any prisoner, the board shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but shall be subject to the orders of the board.

(4) The board may adopt other rules it considers proper or necessary, with respect to the eligibility of prisoners for parole, and the conduct of parole hearings or conditions to be imposed upon parolees. When an order for parole is issued it shall recite the conditions thereof.

History: En. Sec. 12, Ch. 153, L. 1955; Sec. 94-9832, R. C. M. 1947; redes. 95-3214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 86, Ch. 120, L. 1974.

Amendments

The 1974 amendment inserted "by appropriate order" in the first sentence after "shall release on parole"; substituted

"as provided in section 80-1905" in subdivisions (1)(a) and (1)(b) for "as provided in section 80-740"; deleted a second sentence in subdivision (1)(b) which read "All paroles shall issue upon order of the board, duly adopted"; and made minor changes in phraseology, punctuation and style.

95-3215. Conditional release. A prisoner on parole who has served one-fourth ($\frac{1}{4}$) of his term or terms, less good time allowances is considered released on parole until the expiration of the maximum term or terms for which he was sentenced, less good time allowances as provided in section 80-1905.

History: En. Sec. 13, Ch. 153, L. 1955; Sec. 94-9833, R. C. M. 1947; redes. 95-3215 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 87, Ch. 120, L. 1974.

Amendments

The 1974 amendment substituted "as provided in section 80-1905" for "as provided in section 80-740"; and made minor changes in phraseology and punctuation.

95-3216. [Transferred from Title 94.]

Compiler's Notes

This section was originally numbered 94-9834. Section 29, Ch. 513, Laws of 1973, renumbered it to appear here. Be-

cause there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9834.

95-3217. Persons may be heard—counsel.

Compiler's Notes

This section was originally numbered 94-9835. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9835.

Appointment of Counsel Not Required

There is no constitutional right to counsel at parole revocation hearing, but rather a statutory right under this section,

which by no means requires board to provide counsel for parolee. Petition of High Pine, 153 M 464, 457 P 2d 912.

Right to Counsel and Hearing

Parolee not released on prison furlough as provided under section 95-2217 was not entitled as of right to counsel and hearing before district court regarding parole violation, since neither is required under this section. Petition of Osier, 156 M 165, 477 P 2d 344.

95-3218, 95-3219. [Transferred from Title 94.]

Compiler's Notes

These sections were originally numbered 94-9836 and 94-9837. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not

reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3218	94-9836
95-3219	94-9837

95-3220. Return of parole violator. At any time during release on parole or conditional release the board may issue a warrant for the arrest of the released prisoner for violations of any of the conditions of re-

lease, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. The warrant shall authorize all officers named therein to return such prisoner to the actual custody of the penal institution from which he was released, or to any other suitable detention facility designated by the board. Any probation and parole officer may arrest such prisoner without a warrant, or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of said probation and parole officer, violated the conditions of his release. Such written statement delivered with the prisoner by the arresting officer to the official in charge of the institution from which the prisoner was released or other place of detention, shall be sufficient warrant for the detention of the parolee or conditional releasee. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation. Pending hearing, as hereinafter provided, upon any charge of violation, the prisoner may, if circumstances warrant, be incarcerated in such institution.

After the arrest of said prisoner, a hearing shall be held within a reasonable time, unless such hearing is waived by the parolee, to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. An independent officer, who need not be a judicial officer, must preside over this hearing. This hearing must be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest. The parolee must be given notice of this hearing and must be allowed to appear and speak in his own behalf and introduce relevant information to the hearings officer.

The hearings officer shall make a summary of what transpires at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information given to him, the hearings officer must determine whether there is probable cause to hold the parolee for the final decision of the board of pardons as specified in section 95-3217.

If the hearings officer determines that there is probable cause to believe that the prisoner has violated a condition of his parole, the probation and parole officer shall immediately notify the board and shall submit in writing a report showing in what manner the prisoner has violated the conditions of release and this report shall be accompanied by the findings of the hearings officer. Thereupon, the board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged, under such rules and regulations as the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release, or enter such other order as it may see fit.

A prisoner for whose return a warrant has been issued by the board shall, after the issuance of such warrant, if it is found that the warrant cannot be served, be deemed a fugitive or to have fled from justice. If it shall appear that he has violated the provisions of his release, whether the time from the issuing of such warrant to the date of his arrest, or any

part of it, shall be counted as time served under the sentence, shall be determined by the board.

History: En. Sec. 18, Ch. 153, L. 1955; Sec. 94-9838, R. C. M. 1947; amd. Sec. 1, Ch. 140, L. 1973; redes. 95-3220 by Sec. 29, Ch. 513, L. 1973.

Compiler's Notes

The previous text of this section may be found under sec. 94-9838 in bound Volume Eight.

Amendments

The 1973 amendment substituted "may, if circumstances warrant, be" for "shall remain" in the last sentence of the first paragraph; inserted the second and third paragraphs; substituted the present first sentence of the fourth paragraph for the former sentence; and deleted "or upon an arrest by a warrant as herein provided," from the beginning of the second sentence in the fourth paragraph.

Appointment of Counsel Not Required

Under this section, parole violator is required to be brought before board for hearing, but court hearing is not required; parole violator does not have constitutional right but has statutory right to an attorney at parole revocation hearing, and board is not required to furnish parolee an attorney during such hearing. Petition of Wing, 154 M 501, 464 P 2d 302.

Promptness of Hearing

Where five-month delay by parole board was seemingly caused by parolee being in hospital, requirement under this section that hearing be "prompt" was not violated. Petition of Spurlock, 153 M 475, 458 P 2d 80.

95-3221, 95-3222. [Transferred from Title 94.]

Compiler's Notes

These sections were originally numbered 94-9839 and 94-9840. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not

reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3221	94-9839
95-3222	94-9840

95-3223. Cases of executive clemency. The board shall investigate and report to the governor with respect to all cases of executive clemency. A majority of the board shall advise, investigate, and approve each such case before the action of the governor shall be final. All applications for executive clemency shall be made to the board, which shall cause an investigation to be made of all the circumstances surrounding the crime for which the applicant was convicted, and as to the individual circumstances relating to social conditions of the applicant. If the board, or a majority thereof, approves such application for executive clemency, it shall advise the governor and recommend action to be taken.

History: En. Sec. 21, Ch. 153, L. 1955; Sec. 94-9841, R. C. M. 1947; amd. Sec. 2, Ch. 73, L. 1973; redes. 95-3223 by Sec. 29, Ch. 513, L. 1973.

Compiler's Notes

The previous text of this section may be found under sec. 94-9841 in bound Volume Eight.

Amendments

The 1973 amendment substituted "executive clemency" at the end of the first sentence for "pardons, remissions of fines and forfeitures, and commutations of punishment after conviction and judgment for any offenses committed against the criminal laws of this state."

95-3224. Notice of hearing on applications for executive clemency. After the board has duly considered an application for executive clemency, and has by majority vote favored a recommendation of executive clemency to the governor, it must pass an order in substance as follows:

"Whereas, the Board of Pardons has officially received an application for Executive Clemency concerning _____, a convict confined in the State

Prison (or to one, who has been found guilty of an offense committed against the laws of the state), who was convicted of the crime of committed at, in the County of, State of Montana, on the day of, 19....., and sentenced for a term of years.

"Therefore, be it ordered that the day of, 19....., be set apart for the consideration of said Executive Clemency matter; and all persons having an interest therein desiring to be heard either for or against the granting of the pardon or reprieve, commutation, restoration of citizenship, remission or suspension of fine or forfeiture are hereby notified to be present at o'clock of said day, at

"Further, ordered that a copy of this order be printed and published in the (here insert name of some newspaper of general circulation in the county where the crime was committed) a daily (or weekly) newspaper printed and published at in the county of, once each week for two weeks beginning,, 19....., and ending"

History: En. Sec. 22, Ch. 153, L. 1955; Sec. 94-9842, R. C. M. 1947; amd. Sec. 3, Ch. 73, L. 1973; redes. 95-3224 by Sec. 29, Ch. 513, L. 1973.

Compiler's Notes

The previous text of this section may be found under sec. 94-9842 in bound Volume Eight.

Amendments

The 1973 amendment substituted "or reprieve, commutation, restoration of citizenship, remission or suspension of fine or forfeiture" for "(or commutation, remission of the fine or forfeiture)" in the second paragraph of the order.

95-3225 to 95-3227. [Transferred from Title 94.]

Compiler's Notes

These sections were originally numbered 94-9843 to 94-9845. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not

reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3225	94-9843
95-3226	94-9844
95-3227	94-9845

95-3228. When publication not necessary. No publication need be made as provided in sections 95-3224, 95-3225, and 95-3226, in the following cases:

1. When there is imminent danger of the death of the person convicted or imprisoned.
2. When the term of imprisonment of the applicant is within ten (10) days of its expiration.

History: En. Sec. 26, Ch. 153, L. 1955; Sec. 94-9846, R. C. M. 1947; amd. and redes. 95-3228 by Sec. 28, Ch. 513, L. 1973.

Compiler's Notes

The previous text of this section may be found under sec. 94-9846 in bound Volume Eight.

Amendments

The 1973 amendment renumbered this section; and substituted the reference to sections 95-3224, 95-3225, and 95-3226, for a reference to sections 94-9842, 94-9843 and 94-9844.

95-3229 to 95-3232. [Transferred from Title 94.]

Compiler's Notes

These sections were originally numbered

94-9847 to 94-9850. Section 29, Ch. 513, Laws of 1973 renumbered them to appear

in this title. Because there has been no change in text, the sections are not reprinted here but may be found in bound Volume Eight as follows:

New Sec.

95-3229
95-3230
95-3231
95-3232

Vol. 8

94-9847
94-9848
94-9849
94-9850

95-3233. Repealed.

Repeal

Section 95-3233 (Sec. 33, Ch. 153, L. 1955; Sec. 94-9833, R. C. M. 1947; redes. 95-3233 by Sec. 29, Ch. 513, L. 1973), re-

lating to the effective date and application of Chapter 153, Laws of 1955, was repealed by Sec. 96, Ch. 120, Laws of 1974.

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